

3. Views from the European Courts

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3.1 The Court of Justice of the European Communities – Advocacy before the Court of Justice: Hints for the uninitiated

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2.1.1 The basic rules of advocacy apply as much in pleading before the European Court of Justice as before any court or tribunal in the United Kingdom: *know your court; know your procedure; and know what you are trying to achieve*. The technique of pleading before the Court of Justice² needs to be different because the nature of the court is different, the procedure is different and the forms of action are different.

1. The author would like to thank his Legal Secretaries, Joxerramon Bengoetxea, Nicolas Lockhart and particularly William Robinson for reading innumerable drafts of this article and making a wealth of helpful suggestions. Errors and omissions are now the sole responsibility of the author, as are the views expressed and the advice given.
2. In what follows, unless the contrary is clear from the context, "the Court" refers to the Court of Justice. Articles of the Community Treaties are referred to by the letters EC (Economic Community), ECSC (Coal and Steel Community) and EAEC (Atomic Energy Community). The "Statute" refers to the Protocol of the Statute of the Court of Justice of the European Community, signed in Brussels on 17 April 1957, as amended by Article 19 of the Act of Accession of 1994 (OJ C 241, 29.8.94 p 25), Council Decision 94/993/EC (OJ L 379, 31.12.94 p 1) and Council Decision 95/208/EC of 6 June 1995 (OJ L 131, 15.6.95 p 33). The "Rules of Procedure" or "RP" refers to the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 (OJ L 176, 4.7.1991 p 7), Corrigendum (OJ L 383, 29.12.92 p 117), Amended (OJ L 44, 28.2.1995 p 61) and (OJ L 103, 19.4.97 p1).

Know your Court

3.1.2.1 The Court of Justice is unlike any other court in the world. It works on a daily basis from texts in eleven languages. Its judgments must be comprehensible in all those languages and capable of application in more than twenty different legal systems.¹ The task assigned to the Court by the treaties – "to ensure that the law is observed"² – entails finding legal solutions that can be applied in a fair and uniform way throughout the European Union and, in many cases, throughout the European Economic Area. A solution, or a method of applying it, which may seem obvious in the English language or according to English law will not necessarily be obvious everywhere else.

3.1.2.2 Contrary to popular belief, there is no single 'civil law tradition' or 'common law tradition' to one or other of which all the legal systems of Europe belong. Each of the Member States, and consequently each of the Judges and Advocates General, brings to the Court an outlook, culture and legal tradition which differs, if only in subtle nuances, from that of all the others.

3.1.2.3 Except in appeals from the Court of First Instance, the Court of Justice is a court of first and last instance in the sense that it does not, like an appeal court, have the benefit of a judgment in the court below; nor can its reasoning be refined or corrected on appeal. Moreover, it cannot require any party, Member State or institution to appear and make submissions. The solution may have to be found without the assistance of those who might have most to contribute.

3.1.2.4 It follows that the Court's approach cannot be the same as that of a national court seeking to resolve a single case in the context of a single legal system. The advocate who takes a little time to understand how the Court works³ and shapes his pleading accordingly can play a crucial role in ensuring that the client's position is fully taken into account.

Know your procedure

3.1.3.1 The procedure of the Court is laid down partly in the Treaties, partly in the Statute of the Court and partly in the Rules of Procedure. The rules leave very little room for the exercise of discretion. None of them can be changed without the unanimous consent of the Member States. By and large, every case must be processed in the same way, even if a simpler or different approach would commend itself both to the parties and to the Court. Where time-limits are mandatory, they

1. Apart from the countries of the EEA, the Court has had to take account of the differences between England and Wales, Scotland, Northern Ireland, the Channel Islands and the Isle of Man, as well as special features of the law applying since 1870 in Alsace-Lorraine.
2. Article 164 EC, Article 31 ECSC, Article 136 EAEC.
3. For a fuller explanation, see Edward, "How the Court of Justice Works" (1995) 20 ELP 539.

cannot be waived, however unsatisfactory or even unjust the result may seem to be.¹

3.1.3.2 The forms of action before the Court are laid down in the Treaties and in Conventions, such as the Brussels Convention². The Court has no inherent 'common law' jurisdiction to fashion new remedies, though the texts have been interpreted with a view to ensuring, as far as possible, a complete system of judicial protection³.

3.1.3.3 The principal forms of action before the Court of Justice are:

- (1) 'direct actions' brought directly before the Court by Member States or Community institutions;⁴
- (2) 'appeals' from the Court of First Instance;⁵ and
- (3) 'references for preliminary rulings'.⁶

3.1.3.4 In direct actions, the Court is principally a court of judicial review. It is not a 'trial court'. It is concerned with fact-finding only within very strict limits and the procedures available are not intended to cope with complex disputes of fact or opinion.

3.1.3.5 In appeals, the jurisdiction of the Court is strictly limited to questions of law. Indeed, it is misleading to talk of 'appeals' since the Court is a 'court of cassation' only⁷. The question in an appeal is not whether the Court of First Instance was, in a broad sense, wrong but whether its judgment is vitiated by error of law or procedure. If the appeal is successful, the case will be sent back to the Court of First Instance for reconsideration. Only in exceptional cases can the Court of Justice set aside the judgment of the Court of First Instance and enter its own judgment.

3.1.3.6 Considerably more than 50% of the caseload of the Court of Justice now consists of references from national courts, principally under Article 177 of the EC Treaty. This is the form of action with which the British advocate is most likely to become involved and to which, for the most part, the rest of this paper is directed.

1. This applies in particular to the time limit of two months for raising a direct action (Article 173 EC) and for lodging observations in references under Article 177 EC (Article 20 of the Statute). Some other time limits can be extended provided that an extension has been applied for before expiry of the time limit - see, for example, Article 40 RP.
2. Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ C 97, 11.4.83, p1 (Protocol of 3 June 1971; OJ C 97, 11.4.83, p12).
3. See, for example, Case 294/83, "Las Verts" [1986] ECR 1339.
4. Principally, Article 169 EC.
5. Article 168a EC; Article 32d ECSC; and Article 140a EAEC.
6. Article 177 EC; Article 41 ECSC; and Article 150 EAEC. A preliminary ruling procedure is also provided for by protocols to several conventions concluded by the Member States, in particular the Brussels Convention and the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, OJ L 266, 9.10.80, p1 (Protocol of 19 December 1988; OJ L 48, 20.2.89, p1).
7. French *casser* = English 'quash'.

The reference procedure

3.1.3.7 The reference procedure is not really a 'form of action'. There cannot be a reference to the Court of Justice except in the context of competent proceedings before a national court. The reference is simply a step in those proceedings and must take place *before* the national judge gives final judgment on the merits of the case.

3.1.3.8 It is true that in some cases the judgment of the Court of Justice will in practice determine the outcome of the case. But it is the national judge and not the Court who must ultimately decide whether that is so and deliver an enforceable judgment.

3.1.3.9 The reference procedure is not, as the media often suggest, a form of "appeal to Luxembourg". It is a process of judicial collaboration – judges helping judges.¹ Parties have no right to require a national court to make a reference, even if the court is one to which Article 177(3) of the EC Treaty applies (see below). Nor are they entitled to dictate the terms of the order for reference or of the questions referred.

3.1.3.10 The procedure essentially involves three stages. The national court must first identify a *question* of Community law on which a *decision is necessary to enable it to give judgment*. Next, the Court of Justice must give a ruling on that question. Finally, the national court must apply the ruling. The Court of Justice is involved only at the second stage, but the other two are just as important.

3.1.3.11 The task of the Court at the second stage involves two objectives which may – and often do – conflict. On the one hand, its ruling must be capable of being applied, not only by the referring court in the instant case, but by *any* court in the EU (or, where appropriate, in the EEA) faced with a similar problem. On the other hand, the Court must not usurp the prerogative of the referring court to give final judgment on the merits. The ruling must be sufficiently concrete to be useful, but sufficiently abstract to be of general application.

3.1.3.12 With this in mind, counsel should approach the case, and plan the strategy to be deployed, on the basis of the same three stages:

- the proceedings in the national court before any reference is made;
- the proceedings before the Court of Justice which in turn involve two distinct phases:
 - the written phase; and
 - the oral phase; and
- the proceedings in the national court after the Court of Justice has given its ruling on the questions referred.

1. "The provisions of Article 177 must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the European Communities" *per* Advocate General Lagrange in Case 13/61, *Bosch* [1962] ECR 45 at p.56; "the special field of judicial cooperation under Article 177 which requires the national court and the Court of Justice ... to make direct and complementary contributions to the working out of a decision" Case 16/65, *Schwarze* [1965] ECR 877 at p.886; see also Case 244/80, *Foglia v Novello (no. 2)* [1981] ECR 3045.

3.1.3.13 In many respects, the first stage is the most important. Unless the groundwork has been properly prepared, all the time and expense involved in the subsequent stages may be wasted.

Know what you are trying to achieve

Stage 1: Proceedings in the national court before a reference is made

3.1.4.1 All the relevant points to be considered at this stage are summed up in Article 177 itself:

- Is there a *question*?
- Is a *decision* on that question *necessary to enable the national court to give judgment in the case before it*?
- Is the national court one against whose decisions there is no judicial remedy under national law?

3.1.4.2 In answering these questions, counsel might follow a flow-chart on the following lines:

(1) Is there a question?

- Does the case raise a Community law point of interpretation or validity?
- If so, is it a point that should be taken in the interests of the client? If not, is it a point which it is the professional duty of counsel to draw to the attention of the judge?

(2) Is a decision on that question necessary to enable the national court to give judgment?

- Is it clear, here and now, that the question of Community law is likely to be decisive of the case?
- If so, would the decision of the national court on that point be open to review in a higher court? (If not, the national court is, in principle, bound to refer the question to the Court of Justice – see question (3) below.)
- Are the relevant criteria of Community law already sufficiently clear for the national court to decide the point without reference to the Court of Justice? (If so, a reference is unnecessary. See also question (3) below.)
- Does the relevance of the 'question' to the case in hand depend on proof of particular facts or matters of opinion? Alternatively, does it depend on a point of national law (e.g. a point of procedure) on which there might be an appeal?
- If so, is there a serious risk that a ruling from the Court of Justice would turn out (either at first instance or on appeal) not to have been 'necessary' for decision of the case? (If so, a reference is at least premature, if not inappropriate.)
- Conversely, would it save days/weeks/months of evidence and argument if the Community law

point were decided first? If so, an immediate reference is probably appropriate, *provided* that the parties and the judge are in a position to settle an agreed statement of facts, at least as a working hypothesis for the purposes of the reference. If they are not, counsel will have to consider what further clarification of the legal and factual issues is required to enable a reference to go forward.

(3) Is the national court bound to make a reference because there will be no judicial remedy against its decision?

Here, one has to assume that the Community law point will be decisive of the case, or some part of it. The question then is whether the decision of the national court or tribunal, however lowly its position in the judicial hierarchy, will be open to appeal or review *on that point*. If not, Article 177 requires the national court to refer. But the so-called doctrine of *acte clair* may apply.

3.1.4.3 Much has been written about this doctrine and it must be admitted that, even in French, the significance of the words *acte clair* is far from clear. In Community law at least, it is a rule of common sense.

3.1.4.4 If the Community system is to work – if there is to be a level playing field – the rules must be the same for everyone and applied in the same way. If national courts at every level were free to interpret Community law each in their own way, the rules and their application would differ from one country to another. Hence Article 177 requires that courts whose decisions cannot be reviewed must refer.

3.1.4.5 On the other hand, it would be absurd to insist that every court against whose decision there is no judicial remedy must faithfully refer every point of Community law no matter how clear or well-settled the point may be. The Court has therefore said – see *CILFIT*¹ – that, before deciding that a point is so clear or well-settled as not to require a reference, national courts should bear in mind that the Community embraces a wide range of languages, legal systems and legal traditions, so that what may appear obvious to a judge in one country may be far from obvious to a judge in another.

Spotting the Community law point

3.1.4.6 Points of Community law do not come neatly wrapped and labelled. In some fields it is likely, or even probable, that Community law will have a bearing on the problem – for example, in competition law, external trade relations, customs duties or sex discrimination. Practitioners in those fields can be expected to have Community law at their finger-tips.

3.1.4.7 Similarly, a case whose facts involve agriculture or fisheries, or the movement of goods, persons, services or capital across the internal frontiers of the EEA may raise a point of Community law. The prudent practitioner will at least consider that possibility.

1. Case 283/81, *CILFIT v Ministry of Health* [1982] ECR 3415.

3.1.4.8 The statistics of the Court of Justice show that lawyers are, to an increasing extent, using Community law to seek a remedy or defence for their clients which national law does not afford. Of the 445 cases lodged in 1997, 116 related to the 'traditional' fields of Community law: 24 to competition and public procurement, 64 to agriculture and fisheries, and 28 to free movement of goods. By comparison, free movement of persons gave rise to 50 cases, social policy to 26, environment and consumer protection to 42 and taxation to 36.

3.1.4.8 Community law may apply, directly or indirectly, in fields which appear, at first sight, to be entirely governed by a British statute or statutory instrument. There may, however, be a Community law obligation which affects the interpretation or the application of the British text. The obligation may be a general obligation flowing directly from one of the Treaties and the general principles of Community law, or a specific obligation undertaken by the UK under a Community regulation or directive. In that event, the British law must, where possible, be construed so as to give effect to the Community obligation.¹

3.1.4.10 Current legislative practice in the United Kingdom is to include, somewhere in the text of a statute or statutory instrument, a reference to any Community obligation to which the legislation is intended to give effect. For older texts, it will be necessary to check the notes in *Current Law Statutes* or the explanatory memoranda attached to statutory instruments.

3.1.4.11 The position is more complicated where the Community text is *subsequent* to the British text. The relevant date for compliance with the Community obligation is not the date when the respective texts came into being, but the date when they are to be applied. So a British statute or statutory instrument may have to be interpreted in the light of a Community text which is later in date. The aim must be to give effect to the Community obligation *as far as possible*.²

3.1.4.12 The problem of reconciling national and Community texts applies in fields as diverse as employment law, VAT, social security, company law, product liability, contracts (especially consumer contracts), product labelling and environmental protection.

3.1.4.18 Fortunately, it is now much easier than it used to be to check the current state of Community law. A wide range of electronic databases and other aids is available to the English-speaking practitioner, and the Court's judgments are, with only a few exceptions, accessible on Internet³ on the day they are pronounced. The Opinions of the Advocates General, which are themselves a valuable guide both

1. Case 14/83 *Von Colson and Kamann* [1984] ECR 1891 and Case C-106/89, *Marleasing* [1990] ECR I-4135.
2. Case C-106/89, *Marleasing*, *supra*, at point 8. See *Duke v GEC Reliance* [1988] AC 618, but more recently *Webb v EMO Air Cargo (U.K.) Ltd* [1995] 1 WLR 1454 (HL). See also Case C-129/96, *Inter-Environnement Wallonie*, [1997] ECR I-7411, as regards the obligations of Member States during the period between the date of adoption of a directive and the last date by which implementing measures must have been put in place.
3. www.curia.eu.int.

to current law and to future trends, are made accessible on the Internet as soon as they are available in each language.

Is your reference really necessary?

3.1.4.14 Counsel should beware of giving way to excessive enthusiasm for the Euro-point. The Treaty rules on free movement, for example, do not normally apply in "purely internal situations"¹ and it would be embarrassing – as well as costly for the client – to have persuaded a judge to make a reference to Luxembourg, only to be told that Community law has no bearing on the case. The desirability of pleading a point of Community law – or, in some cases, the obligation to do so – should be weighed with the same care as is given to any other point of law.

3.1.4.15 What is important from counsel's point of view is that the potential impact of Community law should have been properly investigated and assessed. This is so for two reasons. First, it cannot be long before failure to use Community law in the interests of the client becomes a recognised ground of professional negligence. Second, even if Community law goes against the interests of the client, it may be counsel's duty to draw it to the attention of the judge.

3.1.4.16 Having identified the point and drawn it to the attention of the judge, it may be inappropriate, for a variety of reasons, to press for a reference. It is implicit in Article 177 that the national courts are the "Community courts of general jurisdiction".² As Community law develops, the ground rules become more clearly established and the work-load of the Court of Justice increases, national courts will necessarily assume the primary responsibility of applying Community law.

3.1.4.17 To an increasing extent, judgments of the Court are written in such a way as to provide the national judge with a 'programme' for solving the case – setting out the points to be considered, the order in which they should be addressed and the elements of fact that are likely to be of relevance at each stage.³ These judgments will also help counsel to assess what evidence should be led and what, if any, are the doubtful points on which a reference to the Court of Justice might be necessary.

1. E.g. Joined Cases 314-316/81 & 83/82 *Waterkeyn* [1982] ECR 4337 (free movement of goods), Case 175/78 *Saunders* [1979] ECR 1129 (free movement of persons), Case C-112/91 *Werner* [1993] ECR I-429 (establishment), Case C-17/94 *Gervais* [1995] ECR I-4353 (services) and Joined Cases C-64-65/96, *Decker & Jacquet* [1997] ECR I-3171 (social security). It is not always clear whether the case is "purely internal", and several recent cases show a difference of opinion between Advocates General and the Court on that point: e.g. Case C-321/94, *Pistre* [1997] ECR I-2343, and Advocate General La Pergola in Case C-131/95 *Huijbrechts* [1997] ECR I-1409.
2. Case T-51/89, *Tetra Pak* [1990] ECR II-309.
3. See, for example, Case 91/92, *Facchini Dori* [1994] ECR I-3325 (various applicable Community law rules); Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, paragraph 59 (various applicable national substantive criteria); Case C-312/93, *Peterbroeck* [1995] ECR I-4599 and Joined Cases C-430/93 & 431/93, *Van Schijndel and Van Veen* [1995] ECR I-4705 (various applicable national procedural rules); Case C-55/94, *Gabhard* [1995] ECR I-4165 (various applicable factual circumstances).

3.1.4.18 A serious consideration militating against a reference must inevitably be the delay involved. The average delay – from the date when the reference is received in Luxembourg to the date of judgment – is currently about 21 months. But this is a misleading statistic in three respects.

- (i) It is an *average*. Some cases are dealt with in less than a year, and many within less than 15 months. Much depends on the nature of the case, the terms of the order for reference and the pleadings of the parties. A case that raises an important new issue of principle is as likely in Luxembourg as in London to take longer than a simple straightforward case. Valuable time will be lost if the terms of the reference are unclear or if it raises questions that are not really necessary to decision of the case. Similarly, if the order for reference or the pleadings are unnecessarily long, time will be lost in translating them.
- (ii) The clock starts to run in Luxembourg only when the reference and all necessary supporting documents have been received at the Registry of the Court of Justice. Significant delays can occur between the date when the judge agrees to make a reference and the date when the order is actually signed, and again between the date of the order and the date when the papers are actually sent to the Court Registry in Luxembourg.¹
- (iii) When the order for reference reaches the Court Registry in Luxembourg, it must be notified to the parties, the Member States, the Commission and, in some cases, the Council and the European Parliament. Each Member State must receive the text of the order for reference in its own language.² The order must therefore be translated into ten other languages before the procedure before the Court can start. Unnecessary delay will occur if the documents sent with the order are incomplete or the order itself requires extensive editing before it can be translated.³

3.1.4.18 Counsel cannot control the time it takes to get a judgment from the Court of Justice but can help greatly in reducing it, first, by

1. For example, in Case C-167/97, *R v Secretary of State for Employment, ex parte Seymour-Smith and Others*, the Judicial Committee of the House of Lords decided to make a reference in December 1995; the formal Order for Reference is dated 13 March 1997; the papers arrived at the Registry in Luxembourg on 2 May 1997.
2. Article 104(1) RP.
3. For example, references from England sometimes incorporate the transcript of proceedings in the referring court including passages on points that have no bearing on the reference and even several pages of submissions on costs! These have to be pruned by an English-speaking lawyer before translation.

ensuring that the order for reference reaches the Court Registry in proper form with the minimum of delay and, second, by writing documents that are short, easy to translate and easy to understand.

How should a reference be drafted?

3.1.4.20 Assuming that a reference is appropriate and the judge is prepared to make it, counsel for the parties will probably be asked to help in drafting it. There is no formal rule as to the form of the reference other than that it must, at some stage, set out the 'question(s)' to which an answer is required. The Court has issued *Notes for Guidance on References by National Courts for Preliminary Rulings*¹ and these should be followed carefully.

3.1.4.21 The crucial point to bear in mind is that the purpose of the reference procedure is to help the national judge to solve a problem. This is more likely to be achieved if the Court of Justice is placed in the position of the national judge so as to understand what the problem is. Experience shows that the procedure works best where the order for reference explains clearly and simply why the judge considers the reference to be necessary: what is the problem and what, in broad terms, are the questions that need to be answered to enable judgment to be given?

3.1.4.22 It is not helpful to present the Court of Justice with a skeleton statement of facts and arguments, followed by a complex series of questions and sub-questions intended to cover every conceivable factual or legal hypothesis which the ingenuity of counsel can devise. Apart from being excessively complicated, and therefore inevitably causing delay, this approach assumes that the Court will be able to give a simple Yes/No answer to each of the questions in the order in which they are put. This rarely proves to be so.

3.1.4.23 The reference should ideally consist of a single document which can be translated and notified as it stands. Annexes are not normally translated so crucial points which appear only in annexes may be overlooked.² If it is essential to 'incorporate by reference' from another document, the relevant passages should be clearly indicated.

3.1.4.24 From the Court's point of view, the most helpful approach is to divide the order for reference into five parts:

- (i) an explanation of the legal context in which the 'question' arises: who is suing whom, and for what, and what are the relevant rules of national procedural and substantive law governing the dispute;
- (ii) an explanation of the factual background, making it clear what facts are proved or admitted and what facts are stated merely as a working hypothesis for the purpose of the reference;

1. [1997] 1 CMLR 75; [1997] 34 CML Rev 1319.

2. For example, in Case 237/84 *O'Flynn* [1986] ECR II-2617, vital information was to be found only in a photocopy of the form on which Social Security Tribunal had registered its decision. These forms are difficult to read at the best of times and would be almost impossible to translate.

- (iii) a brief summary of the arguments advanced by the parties before the national court;
- (iv) an explanation of the national judge's reasons for considering that a ruling by the Court of Justice is necessary to enable judgment to be given.
- (v) the 'question(s)'.

3.1.4.25 The question(s) should be stated in sufficiently broad terms to enable the Court to decide how best to set about the answer. The Court cannot rule on the interpretation or validity of national law, and the question(s) should not invite it to do so.

3.1.4.26 Finally, and above all, it should be remembered that many of those who read the order for reference will read it in translation. Legal jargon does not translate easily from one language to another, and direct transposition may cause hopeless confusion. For example, *jurisdiction* in French (and other Latin languages) means 'court' rather than 'jurisdiction' for which the appropriate translation is *compétence*.

3.1.4.27 The golden rule is to write as simply as possible, using short sentences with the minimum of subordinate clauses. This will ensure that the reference is translated quickly, that it is translated well and, above all, that it is correctly understood.

Stage 2: Proceedings in the Court of Justice

3.1.5.1 The procedure before the Court falls into two phases: the written phase and the oral phase. The Court's *Notes for the Guidance of Counsel* set out in some detail the points to be borne in mind in framing written pleadings and making oral submissions. What follows is intended to supplement that advice.

3.1.5.2 In all advocacy, the purpose of pleading is to influence the mind of the judge. Pleading that does not reach the mind of the judge because it is long-winded, confused, obscure or just plain boring is a waste of the advocate's time and the client's money.

3.1.5.3 Two additional points are important in pleading before the Court of Justice. First, written submissions will have to be translated, and oral submissions interpreted, into one or more other languages. The Court's internal working language is French, but translations or interpretation into other languages may be required.¹ Pleadings should be written in a style that will be easy to translate and clearly understood. Second, the procedure before the Court should be seen as a *continuum*. Written pleadings need not repeat what has already been said in the order for reference, and oral pleadings need not repeat what has been said in the written pleadings.

3.1.5.4 It is difficult – and in direct actions it may be impossible² – to raise a new point at a late stage in the proceedings. Rulings of the Court are liable to affect a very wide range of interests apart from those of the parties to the national proceedings. The Rules of

1. See articles 29 and 30 RP.
2. Article 42(2) RP.

Procedure require that notice of the reference be published in the *Official Journal* and that the text be sent to the Member States and the institutions. Consequently, the Court is reluctant to entertain new points which go beyond the scope of what has been notified and even more reluctant to hear oral argument on points that are not at least foreshadowed in the written pleadings.

The written phase

3.1.5.5 The written phase starts when registration of the case is notified to the parties, the Member States and the institutions and published in the *Official Journal*. Parties then have two months plus "extension on account of distance" (ten days for the UK) to submit one set of written observations.¹ That time limit is mandatory and cannot be extended. If the deadline is missed, it is still possible to make oral submissions but this may be far less effective.

3.1.5.8 In references, the Rules of Procedure provide for only one round of written pleadings, known as 'Observations'. There is no opportunity to reply in writing to the written observations of other parties. It may therefore be necessary to deal, not only with the arguments in the client's favour, but also those against. There is no point in raising a bad argument merely to rebut it. But a good argument is likely to be pleaded by someone – if not a party, then a Member State or institution – and if rebuttal cannot safely be left to the oral hearing, it should be covered in the written observations.

3.1.5.7 Observations are submitted in the 'language of the case' (the language of the referring court) and will be translated into French for the use of the Court by the Court translators. The Member States always plead in their official language (or one of them) and the Court provides parties with a translation into the language of the case.

3.1.5.8 Once the round of written pleadings is complete, they will be summarised by the Judge Rapporteur for the judges who are to decide the case. In theory, this summary (the Report for the Hearing) should be read to the Court at the beginning of the oral hearing.² Nowadays, it is taken as read.

3.1.5.9 Counsel should always keep in mind, when drafting observations, that the pleadings will not necessarily be read by the judges in their original form or their original language. Points that are not clearly identified as new or separate points may be overlooked; treasured nuances – especially of legal language – may be lost or obscured.

3.1.5.10 So, as before, the watchwords should be brevity, simplicity and clarity. Fortunately, there are no prescribed forms, no hallowed formulae and no words of style or rituals to be followed. While it may be helpful to study precedents, the sole aim of the pleader should be to present the client's position simply and clearly in the way most appropriate to the circumstances of the particular case.

1. Article 20 of the Statute.
2. Article 18 RP, fourth paragraph.

3.1.5.11 Translation takes time and every unnecessary page of pleading will delay the progress of the case. The order for reference should be taken as the starting point without repeating its contents. As a rule of thumb, observations should be no longer than 30 pages in complex cases and 10 pages in straightforward cases. Many excellent pleadings are even shorter than that.

3.1.5.12 Any significant supporting documents should be annexed. Where a particular passage is relied on, it should either be quoted *verbatim* in the pleading or clearly identified by reference to the relevant pages and/or paragraphs. (Photocopies should be legible !)

3.1.5.13 It is not wise to relegate points of pleading to annexes since these are not normally translated or summarised by the Judge Rapporteur. If the pleadings have to be long or detailed, it is better to provide an 'executive summary' at the beginning and, if appropriate, an index. This will also help to ensure that the pleadings are faithfully reflected in the Report for the Hearing.

3.1.5.14 ECJ caselaw can be cited by the name or a commonly accepted abbreviation (e.g. *Cassis de Dijon* or *Factortame I*) together with the case number and the page reference in *European Court Reports*.¹ Other Community texts such as regulations and directives can be referred to by their number and the relevant page of the *Official Journal*.

3.1.5.15 Since the Court of Justice does not have jurisdiction to interpret national law, the question will be whether any such law, if enacted or applied by any of the Member States, is compatible with Community law. So it may be material for the Court to know how the national rule has been interpreted by the national courts and how it operates in practice. Most of the British law reports are available in the Court library, but if the point is important, it is best to provide a photocopy of the relevant report, making clear what passages are referred to.

The oral phase

Is an oral hearing necessary ?

3.1.5.16 Once the written procedure has ended and the necessary translations are available, the Registry will write to the parties asking whether they wish to have an oral hearing. In direct actions, an oral hearing must take place unless all parties expressly agree to dispense with it.² In appeals from the Court of First Instance, the Court can dispense with the oral hearing "unless one of the parties objects on the grounds that the written procedure did not enable him fully to defend his point of view".³ In preliminary references, the Court can dispense with the oral hearing unless a party, Member State or institutions has expressly asked for it.⁴ If anyone asks for an oral hearing, then all parties can take part.

1. The page numbers of the English text are different from those of the original texts up to the end of 1972, after which the page numbers coincide.
2. Article 44a RP.
3. Article 120 RP.
4. Article 104(4) RP.

3.1.5.17 Counsel will therefore have to consider whether to ask for an oral hearing. An unnecessary oral hearing can add several months to the time taken for judgment and the client's interests are not best served by wearying the Court with a repetition of what has already been said in writing. On the other hand, the oral hearing will be the only remaining opportunity to deal with points that have not been covered in the written observations and to rebut points made by other parties. There is no doubt that, in some cases at least, a convincing oral presentation does affect the result.

The Preliminary Report and the Report for the Hearing

3.1.5.18 The Judge Rapporteur prepares two reports on the basis of the written pleadings: the 'Preliminary Report' (the *Rapport Préliminaire*) and the Report for the Hearing already mentioned.

3.1.5.19 The Preliminary Report is an internal working document submitted to the whole Court (Judges and Advocates General) in general meeting. The Judge Rapporteur, after consultation with the Advocate General, gives an overall view of the case and makes proposals for the procedure to be followed:

- should the case be heard by the Court in plenary session or can it be dealt with by a chamber of three or five judges?
- is it necessary to undertake 'preparatory inquiries' (e.g. call for documents, put questions to the parties for written or oral answer, or (in direct actions) hear witnesses or experts)?
- has an oral hearing been asked for and, if not, is it necessary? If so, are there any particular points on which the parties should be asked to comment or concentrate?
- how long is the hearing likely to last (very important for scheduling the Court's calendar)? In most cases the Court accepts the Judge Rapporteur's proposals without discussion, and the hearing (if any) will be fixed for a date about six to eight weeks later.

3.1.5.20 Parties are not consulted about the date for the hearing but the Court does try to be accommodating in this respect since it prefers to hear argument from counsel who knows the case well and can, if necessary, explain what happened in the referring court. The Registry should therefore be informed well in advance if particular dates would create insuperable problems.

3.1.5.21 The Report for the Hearing will be sent to parties three weeks before the hearing. When there is no oral hearing, the Report of the Judge Rapporteur will be sent to the parties for comment before the Advocate General delivers his Opinion. Being a report by the Judge Rapporteur to the other judges, parties cannot require that it be altered. But serious errors, omissions or misunderstandings should be pointed out as soon as possible – ideally by fax to the Registry. Minor points can be mentioned in the course of the oral presentation.

1. Articles 45-54 RP.

Procedure at the oral hearing

3.1.5.22 Oral hearings before the plenary Court are normally on Tuesdays and before the Chambers on Thursdays. Two or three hearings are usually scheduled for each day. Parties will be asked by the Registry whether they intend to take part, who will speak and for how long. What is required at this stage is an estimate of the maximum time required.

3.1.5.23 Speeches are limited to a maximum of 30 minutes before the plenary Court and the Chambers of five judges, and a maximum of 15 minutes before the Chambers of three judges. A request for extra time (rarely granted) must be made well in advance and good reasons for the request must be given. Admittedly, 30 minutes – let alone 15 minutes – is a very short time by British standards, but it is surprising how much can be said in that time provided the time is used well.

3.1.5.24 Before the hearing begins, counsel will be invited to meet the President in the judges' retiring room. The President will confirm the order of pleading and ask counsel to confirm their estimates of the time they expect to take. The Judge Rapporteur and the Advocate General may mention points they would like counsel to deal with in the course of their pleading or give advance notice of questions they are likely to ask.

3.1.5.25 Two warnings. First, the President will not allow counsel to speak for longer than the time mentioned in replying to the letter from the Registry. Second, it is too late at this stage to ask to lodge new documents. Such requests should be made in advance – if necessary, by fax to the Registry – and notified to the other parties.

3.1.5.26 Counsel for the parties to the action in the national court speak first, followed by the representatives of the Member States, followed by those of the institutions. The representative of the Commission always speaks last. The judges rarely interrupt during the speeches. At the end of the speeches, the Judge Rapporteur, the Advocate General and the other judges may put questions to counsel. Thereafter, the President will ask those who have spoken (in the same order) whether they wish to reply briefly to what has been said by others in the course of the hearing. (Any reply to what has been said in the written observations should have been made in the first speech.)

3.1.5.27 The oral hearing is the opportunity for counsel, face to face with the Advocate General and the judges who will decide the case, to focus the issues, to highlight the crucial points in the client's favour and, where necessary, to reply to points made by others. Merely to repeat what has already been said in writing is a waste of this opportunity. Most of all, it is boring. A bored judge is liable to have switched off before the good point is reached!

3.1.5.28 Some of the judges and other participants will be following the oral submissions through simultaneous interpretation. Interpretation means what it says. The interpreters do not provide a running word-for-word translation. They 'interpret' in one language what the speaker is seeking to convey in another – not just the words, but the style and emphasis.

3.1.5.28 The interpreters study the case file before the hearing and can often predict what the arguments will be. But they like to have an indication of the scheme counsel intends to follow. It is helpful to send an outline or notes, by fax to 00352-4303-3697, a day or two in advance of the hearing. Where counsel intends to quote *verbatim* from a case, from a legislative text or from a document such as a letter or report, this should be mentioned so that the interpreter can bring the appropriate translation to the hearing. A final version of counsel's notes can be handed in just before the hearing.

3.1.5.30 It is *not* necessary to provide a prepared text of the submissions in advance. Indeed, prepared texts make life more difficult for the interpreters since they must be ready to interpret what is actually said if counsel departs from the text. Moreover, written texts generally involve longer sentences and more complicated constructions than are used in direct speech. Languages differ in structure and a complex sentence in one language may have to be broken down and reconstructed in order to be clearly understood in another. When the speaker is speaking from notes in a normal way and at a normal speed, the interpreters can "get inside the head of the speaker", anticipate the drift of the argument and really convey to the hearer the sense of what is being said.

3.1.5.31 There are two further reasons why counsel should not read from a written text. First, nothing is more acutely boring than listening to interpretation of a prepared text in another language. Second, unless counsel speaks first, reliance on a prepared text makes it difficult for counsel to take account of, or react to, what has been said by others. Why repeat points that have been adequately covered already? If an argument has been well put by a previous speaker, counsel should be ready to adopt or rebut it. That, after all, is the essence of oral argument.

3.1.5.32 Some clients insist on vetting in advance what counsel intends to say. In that event, counsel should first agree the basic contents and thereafter insist on structuring the text in such a way that, when read, it will sound like direct speech – short sentences; few subordinate clauses; simple, direct and colloquial language. A touch of humour will help, but elaborate jokes are liable to fall flat.

3.1.5.33 It is best to begin the speech by indicating what points it is intended to cover and to make clear, as the speech proceeds, when counsel is moving from one point to another. This will help both the interpreters and the judges. It is not necessary to rehearse facts which are set out in the Report for the Hearing. But it is useful to draw attention, very briefly, to the salient features of the case from the client's point of view so as to put the arguments in context. Thereafter, it is best to concentrate on two or three points of argument or rebuttal so as to get them fully home. Where counsel does not intend to develop a point because it has been adequately covered in writing, it is sufficient to draw the Court's attention to the relevant pages and paragraphs of the observations.

3.1.5.34 It is not necessary in the course of oral pleading to give full citations for caselaw or legislation provided that the text in question, and the passage to which reference is made, are clearly identified. Nor is it necessary to read at length from judgments of the Court in order to make a point. It is sufficient to say "As the Court held in *Humperdinck*,

.....". Counsel should beware that a point that is clear enough in the English version of a text may simply not be reflected in other language versions.

3.1.5.35 At the end of the oral hearing, the Advocate General will announce the date when he will present his Opinion or will postpone that announcement to a later date. Presentation of the Opinion closes the oral phase of the procedure. Thereafter, the judges deliberate and judgment is pronounced in the language of the case.

3.1.5.36 As a reference for a preliminary ruling is a step in the national procedure, costs are left to the national court. In direct actions, costs normally follow success and submissions about costs should be made at the oral hearing. The Court charges no court fees.

3.1.5.37 Judgments of the Court and Opinions of the Advocates General are published in the European Court Reports (*ECR*). Recent Judgments and Opinions may be found, in summary, in the Court's weekly Bulletin and, in full, at the Court's Internet site.

Stage 3: Proceedings in the national court after the Court has given judgment

3.1.6.1 If all has gone according to plan in the first two stages, the 'question' of Community law should now be clear and all that remains is for the national court to apply it. The Court's interpretation of Community law is binding on the national court.¹ Indeed, that interpretation is binding on *all* national courts in order to achieve the main purpose of the reference procedure, namely uniform application.² Subject to that, it is entirely for the national court to determine how the case before it is to be decided.

3.1.6.2 The usefulness of the Court's judgment in disposing of the case will, of course, be directly proportional to the care that has been given to focussing the factual and legal issues in the order for reference and the written and oral submissions. If uncertainties remain, there may be no alternative to a further reference, and that may, in some cases, be the proper course. Three circumstances, in particular, may give rise to a second reference.

- (i) New points of Community law may arise in the course of the case – particularly if it is a test case. Thus, the first *Factortame* case concerned the power of national courts to grant interim relief where rights claimed under Community law are at issue.³ The second considered the substantive question as to the compatibility of the Merchant Shipping Act with Community law.⁴ The third,

1. Case 29/68, *Milchkontor v Hauptzollamt Saarbrücken* [1969] ECR 165, paragraphs 2 & 3.
2. Case 61/78 *Denkavit Italiana* [1980] ECR 1205; Case 24/86 *Blaziot v University of Liege* [1988] ECR 379.
3. C-213/89, *R v Secretary of State for Transport ex parte Factortame* (No 1) [1990] ECR I-2433.
4. C-221/89, *R v Secretary of State for Transport ex parte Factortame* (No 2) [1991] ECR I-3905.

concerning the conditions of liability in damages of a Member State for a breach of Community law, became necessary in consequence of the Court's answer in the second case.¹

- (ii) National courts may consider that the Court's initial reply is unclear, and may seek clarification.² The Sunday trading saga is a good example. In those cases large retailers sought to challenge the compatibility of the regulation of trading on Sundays with the principle of the free movement of goods.³ In *Torfaen*,⁴ the first such case, the Court contented itself with an abstract answer and referred the question of proportionality back to the national court. Further questions were referred to the Court on this point because the national court did not feel able to assess the proportionality of primary legislation. The Court, in *B & Q plc*,⁵ resolved the issue, by declaring that Article 30 did not apply.
- (iii) There are those cases in which a national court is not satisfied by an earlier judgment of the Court, and seeks to challenge that ruling through a further reference on materially similar or identical facts. The Court has sometimes dealt rather sternly with such cases, emphasizing the obligation of national courts to respect its judgments.⁶ In other cases, the Court has simply restated its earlier caselaw.⁷

3.1.8.3 In the vast majority of cases, national courts find no difficulty in applying the Court's judgment. The Court tracks the application of its judgments in the national courts, and maintains a database of national decisions. Counsel can assist by inviting the judge to send a copy of the judgment to the Court.

1. Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame (No. 3)* [1996] ECR I-1029.
2. See, for example, Case 142/86, *Wacker Werke* [1997] ECR I-4649, where the national court came back for clarification of the notion of the reasonable means of calculating added value in outward processing operations following the Court's judgment in Case C-16/91 *Wacker Werke* [1992] ECR I-6821.
3. Article 30 of the EC Treaty.
4. Case C-145/88, *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.
5. Case C-189/91, *B & Q plc* [1992] ECR I-6635.
6 See, for example the banana cases, Case C-485/93 *Atlanta* [1995] ECR I-3761, paragraph 50: "The national court's obligation to respect a decision of the Court of Justice applies in particular to the Court's assessment of the Community interest and the balance between that interest and that of the economic sector concerned" (emphasis added). The Court was referring to its earlier judgment in Case C-280/93, *Germany v Council* [1990] ECR I-4973, which concerned the "same factual circumstances".
7. See, for example, Joined Cases C-418-421/93, C-460-462/93, C-464/93, C-9-11/94, C-14 & 15/94, C-23 & 24/94 and C-332/94, *Semerano Casa Uno* [1996] ECR I-2975, the same national court maintained substantively identical questions before the Court regarding the Sunday trading saga, despite the Court's judgment in Joined Cases C-69/93, *Punto Casa and PPV* [1994] ECR I-2355.

Conclusion

3.1.7.1 The Court of Justice is so unlike any other court that counsel may find it intimidating. But most of those who appear regularly seem to find it user-friendly. Nearly all procedural problems can be overcome provided they are spotted in time, and the staff of the Registry are always ready to respond to enquiries by phone or fax.

3.1.7.2 The advice given here can be summed up in four maxims:

- keep it clean and simple;
- don't waste paper;
- don't waste time
- don't be boring.

3.1.7.3 All that remains is to hope that those who have read this book will feel that they have joined the ranks of the initiated.

3.2 The Court of First Instance of the European Communities

Judge Christopher Bellamy

Jurisdiction

3.2.1.1 The principal role of the Court of First Instance is to control the legality of decisions and other acts adopted by the Community institutions in actions brought against them by natural or legal persons.

3.2.1.2 Following widespread recognition of the need to relieve the European Court of Justice (ECJ) of part of its workload, particularly in cases involving difficult factual analysis, the Single European Act, signed in February 1987, included a new Article 168a to the EC Treaty² which gave the Council the power to create a Court of First Instance (CFI) "attached to the Court of Justice with jurisdiction to hear and determine a first instance, subject to a right of appeal to the Court of Justice on points of law only" certain classes of action or proceedings as determined by the Council, with the exception of requests for a preliminary ruling under Article 177 of the EC Treaty.

3.2.1.3 The CFI was formally established in October, 1988,³ initially to deal with actions brought by natural or legal persons against the European Commission relating to the implementation of the EC and ECSC competition rules applicable to undertakings; certain actions for damages against Community institutions; and disputes between the Communities and their employees under Article 179 of the EC Treaty.

1. The opinions expressed are purely personal. The author is grateful to David Scorey, barrister, for help with this article.
2. See also ECSC Treaty, art 32d and Euratom Treaty, art 140a which are identical.
3. Council Decision 88/591/ECSC, EEC, Euratom, of 24 October 1988 (OJ 1988 L319/1), and corrigendum, OJ 1989 L241/4.