The Nature of the Community Judicial Process

How the Court of Justice works as a judicial body

by David Edward

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In 1921, Justice Benjamin Cardozo, then a judge of the Court of Appeals of the State of New York, delivered a series of lectures at Yale University entitled *The Nature of the Judicial Process*. In it he explored the way judges go about the work of deciding cases. Believing that the lectures would be technical and would not attract a great many people, the university authorities arranged for them to be given in a comparatively small auditorium. Contrary to expectations, the crowds increased until they finally ended in the largest auditorium available.³

Seventy years on, there still seems to be a real interest in what judges do and how they do it. There are about 11,000 visitors to the Court of Justice each year. The court rooms are often full and groups are encouraged to book six months in advance to ensure a seat. But what the visitor sees in Luxembourg – the public hearings in open court – is, at very most, 10-15% of the Community judicial process. The work of a Community judge is essentially work in committee and every judge is sworn to preserve the secrecy of the Court’s deliberations.⁴

The fact that judges may not reveal how the Court reached its decision in a particular case does not mean that all the workings of the Court must remain a mystery. In his contribution⁵, Professor Everling, a former judge, gives an experienced insider’s view of the Court’s process of reasoning. The present contribution, by the most junior insider, seeks to explain more mundane aspects of the way in which the Court has gone about its work during Ole Due’s presidency – a presidency marked by an unostentatious search for efficient justice.

Those who have worked with Ole Due know how deep has been his commitment to the cause of justice, to the Court as an institution and, not least, to the happiness and well-being of those who work there. Those who have not had the privilege of working with him can judge the Due Court only by what they read. If they are to judge fairly, they must first understand the constraints within which the Court has to work.

The working methods of the Court were originally modelled on the procedures of the French *Conseil d’État*, but the plant has grown a long way from its roots. The way in which it has grown has been conditioned by four main factors:

- the procedural structure laid down by the Treaties, the Statute of the Court and the Rules of Procedure – none of which may be altered without the unanimous consent of the Member
States meeting in an Intergovernmental Conference or in the Council of Ministers;
- the unusual nature of the Court's jurisdiction, especially the procedure for preliminary references from national courts, principally under Article 177 of the EC Treaty (hereafter »references»);
- the language régime which requires the Court, unlike any other court in the world, to work on a daily basis in nine languages; and
- the fact that the members and staff of the Court, as well as those who plead before it, have been bred in a variety of legal traditions spanning the historic divide between the so-called Civil Law and Common Law systems.

The procedural framework

The procedural framework within which the Court must operate is fairly rigid. The Court has little discretionary power to dispense with strict application of the rules laid down in the texts. This is understandable since the Court must work in a way that is acceptable to all the Member States. But it often means that the Court is unable to adopt a simple method of dealing with a simple problem as it arises. There is very little room for experiment, although experiment might be the best way of seeing whether there should be a change in the rules.

For present purposes, the most important features of the procedural framework are the following:

The procedure before the Court is divided into two parts, written and oral. The written procedure must be completed before the oral procedure starts. Except in appeals from the Court of First Instance, there must be an oral hearing unless all parties agree, explicitly or implicitly, to dispense with it.

The Court has no power to control its own caseload. On the contrary, as soon as proceedings are begun, the Court becomes responsible for notifying the opening of proceedings and all other procedural steps to the parties, the Member States and the Community institutions concerned. In references, the decision of the referring court must be notified to each Member State in its official language.

Every reference must therefore be translated into eight other languages before any further procedural steps can be taken. If
the decision of the referring court is long or difficult to translate, this requirement may impose a delay of several weeks before any further procedure can begin.

Once a reference has been notified, the parties, the Member States and the institutions have two months within which to lodge observations. They have no opportunity to comment in writing on each other’s observations\textsuperscript{12}. The two-month time limit is mandatory and cannot be extended.

In direct actions, once the initial application has been lodged, the Court has some discretion to extend time limits for lodging written pleadings\textsuperscript{13}. This is often done, especially in infringement actions under Art 169 EC when the Commission and the defendant Member State are engaged in negotiations for settlement\textsuperscript{14}. On the other hand, the time limit for starting proceedings by lodging the initial application cannot be extended and, in the absence of special circumstances, the applicant and defendant must define the scope of the action in their first pleadings and cannot subsequently raise new issues of fact or law\textsuperscript{15}.

Subject to that, the speed and completeness of the written procedure is essentially in the hands of the parties. The rules envisage that it is not until the written procedure is complete that the Judge Rapporteur will present his »Preliminary Report« to the Court with his recommendations as to how the case should be dealt with – in particular, whether preparatory inquiries or other preparatory steps are necessary and whether the case should be dealt with in plenary session or referred to a Chamber. The Court will then decide what action to take\textsuperscript{16}.

If the Rapporteur and Advocate General (or one of their Legal Secretaries) can read the pleadings in the original language, it may be possible to do a certain amount of preparatory work as the written pleadings come in. But the Court as such cannot normally take any preparatory step – far less prepare for the oral hearing – until all the written pleadings have been lodged and the work of translating them, together with any supporting documents, is complete. This affects the Court’s capacity to deal quickly with obvious problems of admissibility (discussed below).

In theory, the oral hearing opens with the reading of the Rapporteur’s »Report for the Hearing«\textsuperscript{17} which summarises the facts, the law and the arguments. In practice, the Report for the Hearing is distributed to the parties in advance and is taken as read. But, again, this Report cannot be prepared until all the necessary translations are available.
The oral procedure ends with the Opinion of the Advocate General delivered by him “acting with complete impartiality and independence... in open court”. Delivery of the Opinion being the last step in procedure, the parties have no opportunity to comment on it. Since, according to the Treaties, the essence of the Opinion is that it is an impartial and independent view of the case, the Court does not try to suggest to the Advocate General how he should go about his task or discuss the Opinion with him after it has been delivered.

Decisions of the Court are valid only when an uneven number of members is sitting in the deliberations, the quorum for decisions of the full Court being seven. Until the changes introduced by the Maastricht Treaty came into full effect, direct actions brought by Member States and Community institutions had to be dealt with by the Court in plenary session. The so-called petit plenum of nine judges was introduced to alleviate the burden of this requirement in cases which did not warrant the attention of all thirteen judges. As it proved rather successful as a way of ensuring a broad cross-section of opinion, it came to be adopted for some references as well.

The Treaty provides that the Court may sit in chambers of three or five judges. Since there are at present thirteen judges, the Court is divided into two big chambers (the Fifth and Sixth), each consisting of six judges of whom five will sit in any given case. The big chambers are then subdivided into four small chambers (the First, Second, Third and Fourth) each consisting of three judges. (A petit plenum normally consists of the big chamber to which the Rapporteur belongs, together with one of the other two small chambers, under the presidency either of the President of the Court or of the president of the big chamber concerned.)

The composition of the chambers is determined by the Court on a proposal by the President and changes from time to time. The presidency of the chambers rotates annually.

Only those judges who were present at the oral hearing may take part in the deliberations. So, where a case has been assigned to a chamber, the chamber may refer the case back to the full Court but there must then be a fresh oral hearing.
The nature of the Court’s jurisdiction

The Court’s work falls into two main categories:
- direct actions and appeals from the Court of First Instance, and
- references from national courts under Article 177 EC and under the Protocol to the Brussels Convention.

Cases in the first category, although they have their own Community characteristics, follow a form of adversarial procedure that is recognisably similar to equivalent procedures in the courts of the Member States: the exchange of written pleadings (application, defence, reply, rejoinder), followed by the oral hearing with opening submissions and replies.

Direct actions and appeals are essentially *lites inter partes* (proceedings between parties on an equal footing) in which the Court is called upon to determine only those questions which the parties have chosen to litigate. On the whole, the Court does not, as it often does in references, seek to redefine the question it has to decide. In infringement proceedings under Article 169 EC, the Court has become increasingly strict in applying the principle that the scope of the Commission’s action is limited by the terms of the reasoned opinion required by Article 169(1).

By contrast, the procedure in references is *sui generis*. It was inspired by the procedure by which, in some Member States, courts can, in the course of a case, refer questions of constitutional law to the Constitutional Court. But the issues raised in references to the Court of Justice go well beyond «constitutional» issues and cover the whole gamut of Community law from wide-ranging issues of principle to the interpretation of highly technical, and frequently ephemeral, regulations.

With the devolution of a large proportion of direct actions to the Court of First Instance, references now account for considerably more than half the workload of the Court of Justice.

Most references are made in the course of litigation *inter partes* before the referring court. It remains the prerogative of the referring court to decide the case on its merits. In some countries, once the reference is made, the referring court is precluded from taking any further steps in the case until the Court of Justice has pronounced.

The function of the Court of Justice is exclusively to interpret
the law to be applied, and then only insofar as Community law is relevant for decision of the case. Even if, in practice, the Court's ruling may determine the outcome of the case where the national court is left with no real discretion as to the result, the purpose of the ruling, at least in theory, is to interpret the law that would be applicable in any comparable case in any of the twelve Member States.

This has several important consequences.

Since the Court cannot decide issues of fact or of national law, it cannot give a direct answer to questions which, as often happens, invite it to do so, such as questions asking whether a provision of national law is compatible with Community law. The Court must either refuse to answer such questions, or reformulate them.

That is not to say that fact and national law are irrelevant. On the contrary, it is often essential to understand the factual and legal background in order to define what the point at issue really is.

The practice of national courts in explaining the facts and the relevant law is very variable. Some national courts assume that the facts are of no importance since the Court is concerned with questions of law only. Some assume that the Court is familiar with all the relevant national law though the legal context of the case may be highly complex both procedurally and substantively. (It is flattering, but not very realistic, to suppose as many pleaders, as well as national courts, seem to do that the Court is familiar with the law and procedure of more than twelve legal systems.) Some referring courts, by contrast, provide an extensive explanation of the legal and factual background, stating their own analysis of the issues. Others send no more than the national file with a list of questions to be answered.

So, despite the theory that the Court is concerned only with questions of law, it frequently has to undertake what amounts to a process of preliminary «fact-finding» on points of pure fact or aspects of national law or some of both. The member of the Court belonging to the country from which the reference comes may be able to help, as may the Court's Research and Documentation Division. But the Court has to rely heavily on the parties, and particularly on the Commission, to fill in the factual and legal background.

The Court cannot, however, rely entirely on the parties nor (a point frequently misunderstood by Anglo-American lawyers) can it base its judgment solely on the material put before it in the
reference and in the written and oral pleadings. The reason is that, while the reference has been made in the context of a particular case arising in one particular country, the Court’s judgment interprets the law for the Community as a whole.

Indeed, the potential ramifications of the case may not even become clear until the Advocate General’s Opinion has been delivered. Even then, the Rapporteur, or other members of the Court, may not agree with the parties or the Advocate General as to what the real issues are, or how they should be defined. So the Court’s deliberations are often devoted as much to identifying the issues as deciding how to answer them.

The language régime

Every case before the Court has its own »language of procedure«. In direct actions this is generally the language chosen by the applicant. In references it is the language of the case in the referring court. In appeals it is the language of the case in the Court of First Instance. Except with special permission, all parties other than Member States must plead, in writing and orally, in the language of procedure. The Member States plead in their own official language, or one of them. Consequently, all nine official languages of the Community are used on a daily basis.

The internal working language of the Court is, for historical reasons, French. This is the language of internal administration and, in general, the language of communication and deliberation between the members of the Court.

The multiplicity of languages of procedure is criticised on the grounds that it is inefficient and that the need for translation causes delay. Insistence on a single language of procedure is criticised on the ground that it limits the parties’ choice of advocate. The adoption of a single internal working language is criticised on the ground that it gives an unacceptable predominance to the French language, to francophones and more generally to French, or »continental«, legal culture.

Taken individually these criticisms are, in some measure, justified. Stated together, they cannot all be maintained. Indeed, those who criticise the multiplicity of official languages (the Tower of Babel complaint) are often also those who criticise the Court’s use of a single internal working language: it would be more efficient to use fewer languages as long as their own is one of them.
It is certainly true that the daily use of nine languages adds greatly to the cost and delay of the Court’s operations. But the system would be less acceptable to the parties, to the national courts and the numerous other «consumers» of Community law without it.

It is one of the strengths of the Community legal system that there is no separate »federal» court structure (which demonstrates that subsidiarity did not begin with Maastricht). The courts of the Member States are the Community courts of general jurisdiction, the role of the Court of Justice being complementary, rather than hierarchically superior. This system would lose much of its credibility if national courts could not formulate their questions to, or receive answers from, the Court of Justice in their own language, or if advocates practising before the national courts were prevented, for linguistic reasons, from representing their clients before the Court of Justice.

In any event, even if pleadings were limited to a few languages, it would still be necessary (as it often is) to go back to the national court file in its original language to check a pertinent fact or to understand the relevance of a particular question or argument. Indeed, the point at issue may, in some cases, be comprehensible only in terms of the legal terminology of the legal system in which the case arises.

In this respect, too, it is an advantage for the Court that cases are pleaded before it by advocates who are familiar with the legal system from which the case comes. And, if the linguistic régime does in any way limit the litigant’s choice of advocate, it has also avoided the emergence of a specialist Bar consisting almost exclusively of native speakers of one or two privileged languages.

The use of a single internal working language has two principal advantages. First, it is more economical and efficient that the members and staff of the Court should be able to communicate with each other without the interposition of translators and interpreters. This applies particularly to the private deliberations of the Court which would lose much of their spontaneity if interpreters were present. Second, as Community legislative texts increasingly show, there is a risk of serious confusion if those responsible for drafting a legal text work from different language versions.

Nevertheless, the use of any one language as internal working language is bound to confer a certain advantage on native speakers of that language. Ideally, the working language would be none’s mother tongue, as the sole official and working language of
the new EFTA Court is English or as, until the eighteenth century, the language of learned communication, including university lectures, was Latin. This solution is not available but the French in which the Court works, and which non-francophones have to speak and write, is certainly not the language of the Académie.

A serious criticism of the Court has been that its judgments have not been available in languages other than French for many months. One of the most important changes introduced under the presidency of Ole Due is that, from the beginning of 1994, judgments are available in all languages within three weeks of the date of delivery. This has been achieved by discontinuing publication (and therefore translation) of the Report for the Hearing – a regrettable but unavoidable sacrifice.

The mixture of legal traditions

It is, in almost every respect, the greatest strength of the Court of Justice as a law-creator that it brings together in a single working institution representatives of nearly all the classical legal systems of Europe.

If a »common law of Europe« is emerging, this is because Community law must, in order to work at all as a »new legal order«, transcend the classical boundaries. Community law has led lawyers in all Member States to rethink many of the basic assumptions they have been accustomed to take for granted about the formulation and classification of legal rules, their interpretation and application. Without such a stimulus to adapt, the national legal systems might have been incapable, on their own, of coping with the legal, social and economic problems of the late twentieth century.

Nevertheless, though the Court’s solutions may be new – sometimes causing surprise and sometimes dismay – they must be operable in all Members States and all legal systems. The national legal systems and the Community system interact and it is the members of the Court themselves who are ultimately responsible for ensuring that they interact effectively. This is why, as happens in practice though it is not required by the Treaty, the Court should include a judge from each of the Member States.

The mixture of lawyers from different legal traditions has implications that are not always obvious. For example, a judge coming from a written tradition will instinctively find it easier to
absorb information and argument in written form than a judge whose tradition depends on oral presentation of the material for judgment. The advocate bred in the common law tradition expects the judge to interrupt him and to debate the difficulties of his case: he is shocked if the case is decided on a point not argued. In other traditions curia novit ius: the advocate would not expect to argue the law, the judge would not expect him to do so, and both would be shocked if the judge, by his interventions, were to give any indication that he had already formed a view of the case: the time for argument is in deliberation, not in open court.

This means that although there may be no difficulty in agreeing that a change in the Court's practice or procedure would be desirable, there may be great difficulty in agreeing what the change should be.

A further consequence is that, although the composition of the Court reflects the spectrum of legal traditions in the Community, it does not, and cannot, reflect the whole spectrum of legal experience and specialisation. The niceties of civil jurisdiction raised by a reference under the Brussels Convention will be as mysterious to one judge as those of ius cogens in public international law are to another. Few, if any, national courts are assumed to know the whole of their own national law, public and private, substantive and procedural. The Community Court, even with the help of its Research and Documentation Division, cannot do more than hope that it has correctly appreciated all the nuances of the law, particularly in specialist fields. Once again, the Court is heavily dependent on the quality of the submissions of the parties and, particularly, of the Commission.

The progress of a case

Allocation of cases to Judges and Advocates General

Almost as soon as a case starts, it is allocated by the President to one judge as Rapporteur and by the First Advocate General to one Advocate General. Between them, they are responsible for considering any procedural points that arise and making recommendations to the President as to how they should be dealt with. They will sit with the President when he hears an application for interim measures and, in general, are responsible for the case as it moves through the various stages of procedure.
The Written Phase

During the written phase the parties are generally left to make the running, particularly in direct actions. The speed at which a case reaches the oral phase depends very much on the language of the case, the length of the documents and the skill and workload of the translators.

Since the written procedure in a reference cannot start until the Court has notified the decision of the referring Court to each Member State in its own language, a considerable time may elapse between receipt of the reference and opening of the written procedure. A further delay, again due to translation, will occur after all the observations have been lodged and the written procedure is, formally speaking, complete.

In practice it may be six months or more before the Rapporteur and the Advocate General can get to grips with the case. This is particularly unsatisfactory where the case gives rise to a preliminary problem of admissibility which ought, ideally, to be disposed of before too much time has been spent on the case.

Admissibility

In direct actions an objection of inadmissibility will often be taken as a preliminary point and can be raised by the Court ex officio. If the point is clear, it can be dealt with by reasoned order without an oral hearing. But this is not always so and the time taken to complete the written phase on a complicated question of admissibility may not be much less than it would have been if the case had been fully pleaded on the merits. Issues of admissibility can take just as much judicial time in deliberation as other issues.

In references points of admissibility are much less frequent and are more often taken by the Court ex officio than by those who submit observations. There are, of course, theoretical objections to the Court taking any point of admissibility in relation to a reference, not least because the Court itself has repeatedly said that it is for the referring Court to decide whether a reference should be made and what questions should be referred.

But there are a few cases where the questions put by the referring court do not arise in the course of a genuine litigation, go well beyond the factual and legal scope of the litigation before the referring court, or are put to the Court without any explana-
tion whatever of the legal and factual context in which they arise. There are, in short, cases where the reference seems to amount to an abuse of legal process.

The problem for the Court when faced with such references is to decide whether, in the long run, it will do more damage to the Community legal system to accept the reference at face value and answer the questions put or to reject the reference as inadmissible. In some cases the Court has avoided the problem by severely limiting the scope of the question. Where references have been rejected as inadmissible, the question critics should ask themselves is whether it would really have been acceptable for the Court to rule on the legality of the French system of wine taxation on the basis of a put up case between two Italian nationals in Italy, to rule on the allocation of television channels in Italy on the basis of an incompetently formulated reference from a court whose jurisdiction had already been denied by the Italian Constitutional Court, or to rule on a point of company law in an action by the author of a legal textbook who had bought one share in a company in order to bring the point before a German court in a shareholder’s action.

In the hope of detecting such problems at an early stage, the Court has now arranged for all references to be read as they come in by a member of the Research and Documentation Division who is familiar with the language and legal system concerned. This arrangement has not been working long enough to judge its success. Where the referring court is prepared to cooperate – and is allowed by its own legal system to act after the reference has been made – it may prove possible to save time and effort later by clarifying the facts and legal issues before the written procedure begins.

The Preliminary Report and the Administrative Meeting

Once the written procedure is complete, the Rapporteur prepares his Preliminary Report for the Court (in French). The draft report is sent to the Advocate General for comment, amended if necessary, and then circulated to the other members of the Court. The working rule is that the Report for the Hearing should be ready at the same time as the Preliminary Report. It is sent for translation into the language of the case once the Court has taken a decision on the Preliminary Report.
The Preliminary Report is a purely internal document. Its form varies from judge to judge. The main purpose, as the Rules of Procedure suggest, is to tell the other members of the Court what the case is about and to make recommendations as to its future. Normally, after a brief introduction which seeks to encapsulate the point of the case, the Report summarises the legal and factual background and the submissions of the parties and concludes with the personal observations and recommendations of the Rapporteur. In the past, some Rapporteurs offered a fairly full analysis of the issues in the case as they saw them. Nowadays, judges have neither the time to prepare nor the time to read long reports, and the observations of the Rapporteur do not normally extend beyond a few paragraphs.

The Court (judges, advocates general and registrar) used to meet every third Wednesday to deal with problems of administration and to consider the Preliminary Reports in cases ready for hearing. The caseload is now such that it has been found better to meet every Monday evening to deal with Preliminary Reports and simple administrative points, starting the meeting an hour earlier every third Monday to deal with more substantial administrative problems.

The most important point to be decided at the Administrative Meeting is whether the case should be dealt with by the whole Court, a petit plenum, a chamber of five or a chamber of three. The Preliminary Report will have stated the view of the Rapporteur and the Advocate General, and this is normally accepted. But other members of the Court may persuade the Court otherwise.

The basic approach suggested by Article 165 (second paragraph) of the Treaty is that the Court should normally sit in plenary session but may devolve certain categories of cases to chambers. (The Council Decision setting up the Court of First Instance takes the opposite approach, providing that that Court shall sit in chambers but may sit in plenary session in certain cases.) The power of the Member States and the institutions to insist that a case be dealt with in plenary session is rarely invoked.

Given the volume of cases to be dealt with, the Court tends increasingly to refer cases to chambers, or at least to a petit plenum. A case will be referred to a chamber of three where the point at issue seems clearly to fall within the scope of existing case law or where it involves the interpretation of highly technical agricultural or customs regulations but raises no problem of principle.
More difficult cases which may raise issues of principle but are not likely to involve breaking new ground will go to a chamber of five.

The decision whether to retain a case before the plenary or refer it to a chamber involves a delicate balance of conflicting considerations. Hearings before the plenary and the subsequent deliberations consume a very considerable number of judge-hours. Many more cases could be dealt with more quickly if they were heard by chambers. At the moment, three days of the week are given over to plenary hearings and deliberations, as compared with one day a week for chambers, yet the chambers deal with as many cases. It is also easier for a bench of three or five judges to engage in active discussion of the case with the pleaders than a bench of nine or thirteen.

On the other hand, many of the cases before the Court are "constitutional" in character or at least raise points that deserve the input of a judge from each Member State and each legal tradition. A further problem is that, where a chamber finds that a case raises points of principle that ought to be dealt with by the plenary, there must be a second oral hearing and a second Opinion from the Advocate General. A year or more may then be lost before judgment is given. There is therefore a natural tendency, at the stage of the Administrative Meeting to maintain a case before the plenary, or at least the petit plenum, if there is any risk that a chamber would find itself unable to decide it.

In these discussions, and in the deliberations later, the rôle of the judge of the country from which the case comes (the so-called 'national judge') is not to urge on the Court a solution favourable to that Member State. Such advocacy would almost certainly be counterproductive. But it is important that the Court should be aware of all dimensions of the cases it has to decide. It is therefore expected that the judge of the country from which the case comes should draw the Court's attention to any special features of the case of which the Rapporteur and Advocate General may have been unaware. This may be a significant deciding factor in determining how the case should be dealt with.

The Administrative Meeting also decides whether any preparatory inquiries are necessary. Most of the cases that involve extensive fact-finding have now been transferred to the Court of First Instance. So it is usually necessary for the Court to put only a few questions to the parties, to ask for the production of documents, or to ask the parties to concentrate on particular points in their
time limit on speeches. The custom is to allow the pleader to speak uninterrupted. This is thought odd by pleaders bred in the common law tradition, but lawyers from many other traditions find it difficult to cope with any form of interruption. After each advocate has spoken, the President invites the Rapporteur, the Advocate General and then any other judge to put questions.

At the end of the hearing the Advocate General says when he will deliver his Opinion.

The last revision of the Court’s Rules of Procedure in 1991 empowered the Court to dispense with the oral hearing in certain circumstances – in direct actions where the parties expressly agree; in references where none of the parties entitled to submit observations has asked to present oral argument; and in appeals from the Court of First Instance where no party expressly objects.

There is now no oral hearing in some 15-20% of cases. What would have been the Report for the Hearing is circulated to the parties as the »Report of the Judge Rapporteur« allowing them a short period for comment. The case can then go straight to deliberation as soon as the Advocate General has delivered his Opinion. This can cut several months off the time taken to deal with a case.

The Deliberation

It is often supposed that, once the Advocate General has delivered his Opinion, the Court has little more to do than to decide whether or not to follow the Opinion and draft the judgment accordingly. This is a complete misconception.

Apart from all other considerations, every judge must make up his own mind how the case should be disposed of. He cannot do so until he has available all the material for judgment including the Opinion of the Advocate General. The Opinion is therefore the starting point for the Court’s deliberation even if, in many cases, the result is the same.

In practice, within a few days of the Opinion being delivered, the Rapporteur circulates a note to the other judges saying how he proposes that the case should be handled. He may say that he agrees (or agrees in general though not in every detail) with the Advocate General and will submit a draft judgment following that line. He may say that he wholly disagrees with the Advocate General and will submit a draft following a different line. Or he
may propose that the case should be discussed before he starts drafting a judgment. In the last situation, the Rapporteur will normally submit a further note setting out the points for discussion.

It is expected, though it does not always happen, that a judge who disagrees with the course proposed by the Rapporteur, or who feels that the Advocate General or the Rapporteur has overlooked an important point, will write a note explaining his position. If, in the light of such notes, it is clear that the Court is seriously divided, the President will normally list the case for discussion, even if the Rapporteur has proposed to submit a draft judgment.

Cases are listed for deliberation about one week ahead. Plenary deliberations normally take place on Tuesday and/or Wednesday (depending on hearings) and on Friday mornings. (If the case is urgent or specially important, the deliberation may continue on Friday afternoon, throughout the weekend or well into the night.) Deliberations of the chambers normally take place on Thursday. It is some measure of the workload of a judge of the Court of Justice that, apart from the cases discussed at the Administrative Meeting on Monday evening, he will in an average week attend 3 or 4 oral hearings and deliberations in 5 or 6 cases.

The deliberation usually starts with the President inviting the Rapporteur to comment. He may have to do so at some length if a number of judges have commented in writing and he disagrees with what they have said. Thereafter there is an open discussion, often vigorous and sometimes heated, which goes on until a consensus or a clear difference of opinion emerges. If there is a clear difference of opinion, the President will take a vote. The discussion may then continue or it may be left to the Rapporteur to produce a new draft (or a first draft). Once consensus is reached, the Court goes over the Rapporteur’s draft page by page.

If there is a vote, this does not mean that, from then on, the majority alone determine the form and content of the judgment. The minority may be quite as active as the majority in testing the soundness of the legal reasoning in the draft. The minority may even suggest that the language of the draft be strengthened in order to make it clear what the Court has decided. Subsequent discussion, which may go on over weeks or even months, may produce changes of allegiance and it may be very difficult to remember, when the judgment is finally approved, who voted which way at the beginning. The Court may indeed only be able to agree as to the real issue in the case after the Rapporteur has
produced several different drafts, so the initial vote may become totally irrelevant by the end.

This, essentially, is what "collegiality" means. All members of the Court are responsible, up to the last minute, for making the judgment as good as it can be, even if they disagree with the result. The system assumes that there will be perfectly legitimate differences of opinion between judges but that, where such differences exist, the view of the majority must prevail.

The difference between this approach and the common law approach, which allows (indeed encourages) the expression of individual opinions, including dissenting opinions, is that the Court, as a court, holds together throughout the process of judgment. The minority are not excluded from the deliberations of the majority, nor do they have any interest in excluding themselves since they may yet be able to swing the majority towards their point of view or at least attenuate what they find objectionable.

The disadvantage of this collegiate approach is that the judgment may simply cloak an inability to reach a clear decision. A camel is said to be an animal designed by a committee, and some judgments of the Court of Justice are camels. Some commentators believe that the Court's work product would be better if dissenting opinions were allowed.

The unconvincing argument against dissenting opinions is that the Community judges would be compromised if they were seen to decide in favour of their Member State of origin or, conversely, if they did not do so. But Advocates General regularly deliver Opinions which may be unwelcome to the authorities of their Member State of origin and there is not the slightest evidence of their being compromised.

The better arguments against dissenting opinions seem to be, first, that it would not be possible for a conscientious judge to decide whether to dissent until the judgment had reached its final form. Second, dissenters would have to write their opinions in such a way as not to reveal how the arguments developed in the course of the deliberation. This would be very difficult as things stand.

In those systems outside the common law world which allow dissenting opinions (such as the German and Danish) the majority opinion is presented in a much more discursive and "explanatory" way than the terse, almost epigrammatic, style currently adopted by the Court of Justice. To introduce dissenting opinions would almost certainly involve a complete change of style for the
majority judgment which would take longer to agree and longer
to translate.

Third, publication of the judgment would also, presumably,
have to be delayed until the dissenting opinions were ready and
translated. It is not self-evident, under existing conditions at least,
that the merits of dissenting opinions, and their contribution to
the evolution of the Court's case law, would outweigh the disad-
vantages of further serious delay in producing judgments, par-
ticularly in references.

Presumably these difficulties could be avoided if dissenting
judges were to take no part in the deliberation after the vote in
which they were defeated. They could then get on with preparing
their dissenting opinion(s) while the majority prepared theirs.
But this would seriously affect, if not destroy, the collegiate
character of the Court and its decision-making process. The
Court would, sooner or later, divide into publicly identified camps
or factions (»liberal« and »conservative«, »activist« and »absten-
tionist« and so on) in the style of some other courts.

This has not happened so far. Indeed, to a newcomer, one of
the most impressive, and in some ways most unexpected, features
of the Due Court has been its relaxed, non-confrontational way of
working. Every deliberation in a difficult case produces some sur-
prise in the attitudes adopted and the votes cast by the judges —
the predictable does not happen and the unpredictable does.
One of the current members of the Court described the deliber-
ation as »the heart of our work«. This is true. And it is also true
that the quality of the heart depends to a great extent upon the
quality of the President.
Notes

1 The expression »Court of Justice« may refer either to the Court of Justice as one of the institutions of the European Union, in which case it includes the Court of First Instance, or to the Court of Justice as a judicial body separate from the Court of First Instance. In this contribution, unless the context suggests otherwise, »the Court« refers to the Court of Justice as a judicial body.

2 Judge of the Court of Justice of the European Communities since 1992; honorary Professor of the University of Edinburgh. Special thanks are due to Michael Widdershoven, Elizabeth Willocks and Joaírramon Bengoetxea who read and commented on a series of drafts. Any opinions expressed are the personal opinions of the writer alone.


5 See page 55.

6 Title III (»Procedure«) of the Statute can be amended by the Council acting unanimously, after consulting the Commission and the European Parliament: Treaty, Art 188 and Statute, Art 56. The Rules of Procedure are adopted by the Court but require the unanimous approval of the Council, which is therefore required for any amendment.

7 As well as the nine official Community languages, Irish is an official language of the Court, RP, Art 29. It has not yet been used in a case.

8 Statute, Art 18.

9 RP, Art 120. In practice, there is an oral hearing in appeals if one of the parties asks for it.

10 Explicitly in direct actions (RP, Art 44a), implicitly in references (RP Art 104(4)).

11 RP, Art 104(1).

12 Statute, Art 20. The time limit is extended, where appropriate, to take account of distance from Luxembourg – Statute, Art 42; RP, Art 81 and Annex II.

13 RP, Arts 40(2), 41(2) and 82. The request for extension must, of course, be made before the time limit has expired.

14 For this reason, infringement actions have adverse repercussions on the Court’s statistics on speed of disposal.

15 RP, Art 42(2).

16 RP, Art 44(1).
17 Until 1994, the Report for the Hearing was published in the *European Court Reports*. Until 1986 (with the exception of 1984 and 1985) it appeared as the «Facts and Issues» part of the judgment.

18 Treaty, Art 166, second paragraph.

19 They do have this opportunity where the oral hearing is reopened after delivery of the Opinion, but the Advocate General will then deliver a further Opinion on which the parties cannot comment – see, for example, Case C-163/90, *Lagres*, [1992] ECR I-4625.

20 Statute, Art 15.

21 EC Treaty, Art 165.

22 To ensure the quorum of seven allowing for illness, etc.

23 Treaty, Art 165, second paragraph. The quorum for chambers is three – Statute, Art 15.

24 RP, Art 10(1). The President of the Court, the Presidents of the Fifth and Sixth Chambers and the First Advocate General, together with the Registrar, form the Administrative Committee of the Court.

25 RP, Art 27(2).

26 RP, Art 95(3).


28 See, for example, case C-296/92, *Commission/Italy*, [1994] ECR I-1.

29 Although not well known, an analogous procedure still exists within the British Commonwealth, enabling a court in one Commonwealth country to ascertain the law in another: British Law Ascertainment Act, 1859. In the United States, the majority of states have a «referred question» or «certified question» procedure by which a federal court, called upon to apply state law, but uncertain about the content of that law, can refer the legal question to the highest tribunal of the state concerned and hold the federal case in abeyance pending the state court's response to the certified question.

30 In Joined Cases C-31-44/91, *Lageder*, [1993] ECR I-1761, the Court was called upon to interpret wine labelling regulations which had been in force for a short period during the summer of 1973.

31 Often referred to, conveniently but inaccurately, as «the national judge».

32 RP, Art 29.

33 In actions brought against a Member State by the Commission under Art 169 EC, the language is one of the official languages of the defendant State. Interinstitutional disputes are pleaded in French.

34 RP, Art 110.

35 RP, Art 29(3).

36 French was the sole official language of the first Community treaty (the ECSC Treaty), the official language of the Court's host state (Luxembourg) and the most convenient common language of the first members of the Court.

49 joined cases C-320, 321 and 322/90, Telemarsicabruzzo, [1993] ECR 1-393.


51 RP, Art 44(1).


38 See, for example, case C-317/91, Deutsche Renault/Audi, [1993] ECR I-5227.


41 The European Parliament seeks the right to supervise the appointment of Community judges – see Report of the Institutional Committee on the Role of the Court of Justice (Rapporteur Willi Rothley), adopted by the Parliament 15 September 1993. None of the documents emanating from the Parliament on this subject mentions the need to ensure that the legal systems and traditions of the Member States are reflected in the composition of the Court.

42 RP, Art 10(1). The Advocates General act for a year in rotation as First Advocate General.

43 RP, Arts 83-90.

44 Unless all the parties and interveners are pleading in French. By custom, the Community institutions are responsible for providing the Court with a translation of their own pleadings into French where the language of the case is other than French. When their own translation divisions are already working at full stretch, this may in itself cause several months delay.

45 RP, Arts 91 and 92.

46 RP, Art 92. The Advocate General is heard in closed session and does not have to prepare a formal Opinion.

47 See, for example, case C-289/91, Kuhn, [1993] ECR I-4439, where the Court was invited to declare unlawful the German legislation governing yield per hectare of quality wines on the ground that it was overgenerous to the wine producer, although the case arose because the producer concerned had overproduced even according to the German legislation.


51 RP, Art 44(1).


53 Treaty, Art 165, third paragraph.

54 In case C-163/90, Legros, [1992] ECR I-4625, which was before the plenary throughout, the delay involved in reopening the oral procedure (at the request of the Council, rather than on the Court’s own initiative) was some 8 months. Case C-46/90, Lagouche, began on 28 February 1990 and was referred back to the
plenary by a chamber on 25 February 1992. By that time there were three other cases before the Court (case C-69/91, Decoster; case C-92/91, Taillandier; and case C-93/91, Evrard) raising the same or a similar point. Judgment was eventually given in all four cases on 27 October 1993 ([1993] ECR I-5267 et seq.).

55 The petit plenum is made up of the chamber of six to which the Rapporteur belongs together with one of the chambers of three which make up the other chamber of six. The choice of chambers is usually such as to ensure the presence of the judge of the country from which the case comes.

56 Currently 30 minutes, but 15 minutes in hearings before the small chambers of three judges and for interveners in direct actions.

57 RP, Art 44a.

58 RP, Art 104(4). A person entitled to submit observations may not have done so but may still ask to present oral argument.

59 RP, Art 120.

60 By custom, except on formal occasions, the members of the Court address each other by their first names and in the first person singular ("tu" rather than "vous"). In deliberations, the judges use surnames and "vous". This is the only element of formality in what, in every other respect, looks like any group of lawyers met to discuss a problem.