How the Court of Justice Works

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The public hearings of the Court of Justice are at most ten to fifteen per cent of the judicial process. Originally based on the French Conseil d'Etat, the working methods of the Court have evolved in response to four main factors: the procedural structure of the Treaties and secondary legislation, the nature of the Court's jurisdiction, the language regime of the Court, and the blend of legal traditions brought to the Court by its members and staff. This article seeks to look beneath the public face of the Court in order to remove some of its mystery and to explain the constraints under which the Court has to work. (The article deals only with the Court of Justice, not the Court of First Instance).

Introduction

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 per cent 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.1 If judges may not reveal how the Court reached its decision in a particular case, that does not mean that all the workings of the Court must remain a mystery. This article seeks to remove some of the mystery and also to explain 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'Etat, 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
—the nature of the Court's jurisdiction, especially the procedure for

* Judge of the Court of Justice of the European Communities. This is an updated and slightly revised version of the author's contribution to the Festskrift til Ole Due, published by G.E.C.-Gads Forlag, Copenhagen (1994). Any opinions expressed are the personal opinions of the writer alone. Unless the context suggests otherwise, the expression "Court of Justice" refers to the Court of Justice as a judicial body separate from the Court of First Instance.

preliminary references from national courts, principally under Article 177 of the Treaty (hereafter "references")
— the language régime which requires the Court, unlike any other court in the world, to work on a daily basis in eleven 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 quite rigid. The Court has little discretion to dispense with strict application of the rules laid down in the texts, not a comma of which can be altered without the unanimous consent of the Member States. This 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 distinct phases, the written and the 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 order for reference must therefore be translated into 10 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. 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. This is often done, especially in infringement actions under Article 169 EC when the Commission and the defendant Member State are engaged in negotiations for settlement.

On the other hand, the time limits for starting proceedings prescribed by Articles 173 and 175 EC cannot be extended. Moreover, in the absence of the 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.

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.

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).

8 RP, Art. 104(1).
9 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.
10 RP, Arts. 40(2), 41(2) and 82. The request for extension must, of course, be made before the time limit has expired.
11 For this reason, infringement actions have adverse repercussions on the Court’s statistics on speed of disposal.
12 RP, Art. 42(2).
13 RP, Art. 44(1).
In theory, the oral hearing opens with the reading of the Rapporteur’s “Report for the Hearing” 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 nine (formerly seven). Until the Treaty on European Union came into 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 11 (formerly nine) judges was introduced to alleviate the burden of this requirement in cases which did not warrant the attention of all the judges. As this has proved rather successful as a way of ensuring a broader cross-section of opinion than can be achieved in a chamber without requiring all the judges to sit, it has come to be adopted for some references as well.

The Treaty provides that the Court may sit in chambers of three, five or seven judges. The Court is currently divided into two big chambers (the Fifth and Sixth), each consisting of seven 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) consisting of three judges, or four judges of whom three will sit (First and Fourth). The composition of the chambers is determined by the Court on a pro-

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14 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.
15 Art. 166 EC, second para.
16 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, e.g. Case C-163/90, Legros, [1992] ECR I-4625.
17 Statute, Art. 15, amended by the Corfu Accession Treaty.
18 Art. 165 EC.
19 To ensure the quorum of nine (formerly seven), allowing for illness, etc.
20 Art. 165 EC, second para., as amended by the Corfu Accession Treaty. The quorum for chambers is three—Statute, Art. 15. As yet, no chambers of seven judges have been established.
21 See the Decision of the Court published in OJ C 54/2, March 4, 1995, for the rules governing the composition of chambers.
posal by the President and changes from time to time. The presidency of the chambers rotates annually.22

Only those judges who were present at the oral hearing may take part in the deliberations.23 So, where a case has been assigned to a chamber and the chamber has referred the case back to the full Court,24 there must 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 Brussels Convention.25

Direct actions and appeals

Direct actions and appeals, 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. It involves the exchange of written pleadings (application, defence, reply, rejoinder),26 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).27

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22 RP, Art. 10(1).
23 RP, Art. 27(2).
24 RP, Art. 95(3).
26 In appeals, there is no right to reply and rejoinder. These will be permitted only if the President "considers such further pleading necessary". See RP Art. 117.
By contrast, the procedure in references is *sui generis*. It was inspired by the procedure by which the courts of some Member States can, in the course of a case, refer questions of constitutional law to the Constitutional Court.\(^{28}\) 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,\(^{29}\) 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.\(^{30}\)

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. In practice, the Court's ruling may determine the outcome of the case because the national court is left with no real discretion as to the result. But the purpose of the ruling is to interpret the law that would be applicable in any comparable case in any of the fifteen 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 decide such issues—for example, questions asking whether a particular 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 is very variable. Some referring courts provide an extensive explanation of the legal and factual background, stating

\(^{28}\) 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.

\(^{29}\) In Joined Cases C-31-44/91, *Lageder*, [1993] ECR 1-1761, the Court was called upon in 1991 to interpret wine labelling regulations which had been in force for a very short period during the summer of 1973.

\(^{30}\) Apparently because Art. 20 of the Statute speaks of the referring court "suspending its proceedings" when making a reference.
their own analysis of the issues. Others send no more than the national file with a list of questions to be answered. Some assume that the facts are of no importance since the Court is concerned with questions of law only. Others 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. (This is flattering, but not very realistic.)

So, although the Court is in theory 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 comes31 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 can it base its judgment solely on the material put before it in the reference and in the written and oral pleadings. This is so for two reasons. First, while the reference is made, and the arguments presented, in the context of a particular national litigation, the Court’s task is to interpret the law to be applied throughout the Community. Second, it quite often happens that the party or the Member State which could provide the greatest help chooses not to lodge observations or appear at the oral hearing. Quite apart from the maxim curia novit iura (“the court knows the law”) which applies in most Member States, the Community-wide interpretation of the law could not depend on the accident of who appears in the particular case that raises the point or what arguments they choose to put forward.

Indeed, the potential ramifications of the case may not 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

It is important to distinguish between the “language of procedure” and the internal working language of the Court.

Every case before the Court has its own language of procedure.32 In direct

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31 Often referred to, conveniently but inaccurately, as “the national judge”.
32 RP, Art. 29.
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 eleven 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 for each case is criticised on the ground that it limits the parties' choice of advocate. The use of French as the internal working language is criticised on the ground that it gives an unacceptable predominance to French as the language of Community law, or that it unduly favours francophones or, more generally, that it favours 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 of procedure and more internal working languages as long as their own is one of them.

It is certainly true that the daily use of eleven 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

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33 In actions brought against a Member State by the Commission under Art. 169 of the Treaty, 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.
advocates practising before the national courts were prevented by a linguistic barrier 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 (and often is necessary) 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 by advocates who are familiar with the legal system from which the case comes. If the linguistic régime limits the litigant’s choice of advocate, it has also avoided the emergence of a specialist Bar consisting of fluent speakers of one or two privileged languages, insensitive to the national background of the case.

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 intervention 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 no-one’s mother tongue, as the sole official and working language of the 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 “Court French” has some stylistic similarities with Latin and 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. In 1989 the delay in publication of European Court Reports was 14 months for French and 22 months for the best of the other languages. From the beginning of 1994 judgments have been available in typescript in all languages on the day of delivery, or very soon after, and in ECR, together with the Advocate General’s Opinion, within four to six months.

This has been achieved at the cost of unavoidable sacrifices: the Report for the Hearing is no longer published and all but a few judgments of the Court of First Instance in staff cases are published only in the language of

38 See, e.g., Case C-317/91, Deutsche Renault/Audi, [1993] ECR 1-6227.
procedure with a detailed summary in the other languages. There remains a temporary backlog in publication of ECR for 1992–93.

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 Member 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, it is an advantage that the Court includes 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

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40 These sacrifices were truly unavoidable. The budgetary allocation was insufficient to achieve publication of everything within an acceptable time, even if sufficient competent legal translators had been available which, for some languages at least, they are not—even freelance. Time spend on ex post facto translation of non-essential documents delays the translation, not only of important judgments and opinions, but also of orders for reference and observations in cases waiting to be heard.

41 ECR is now complete for 1992–93 in Greek, Italian, Portuguese and Spanish. The greatest delay is in Dutch, English and German, but “priority cases” are available in all languages on CELEX.


43 The European Parliament seeks the right to supervise the appointment of Community judges—see, e.g., Report of the Institutional Committee on the Role of the Court of Justice (Rapporteur Willi Rothley), adopted by the Parliament September 15, 1993. None of the documents emanating from the Parliament on this subject seems to take account of the need to ensure that the legal systems and traditions of the Member States are reflected in the composition of the Court.
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 iura: 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, it may not be at all easy for the Court and the Member States to agree 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 national 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 the Judge Rapporteur and Advocate General

Almost as soon as a case starts it is allocated by the President to one judge as Rapporteur and by the First Advocate General44 to one Advocate General. Between them, they are responsible for considering any procedural points that arise and make 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 measures45 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.

44 RP, Art. 10(1). The Advocates General act for a year in rotation as First Advocate General.
45 RP, Arts. 83–90.
As mentioned above, 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, so a considerable time may elapse between receipt of the reference at the Court Registry 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 that 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 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 explanation whatever of the legal and factual context in which they arise. There are some cases where the reference seems to amount to an abuse of legal process.

When faced with such references, the Court has two problems, one of judicial economy, the other of judicial propriety. Where a reference identifies the issues and puts clear, pertinent questions, the parties, the Member States and the institutions know where they stand. Their pleadings will be

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46 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.

47 RP, Arts. 91 and 92.

48 RP, Art. 92. The Advocate General is heard in closed session and does not have to prepare a formal Opinion.
well-focused, and the Court will normally be able to provide a useful answer in less than eighteen months. By contrast, a badly formulated reference leads to unfocused pleading. Processing the case involves an inordinate investment of time and resources and inevitably delays the progress of other, better prepared cases.

The Court must also consider whether, in the long run, it will do more damage to the Community legal system to accept a reference at face value and answer the questions put or reject it as inadmissible.\(^{49}\) In some cases the Court has avoided the problem by severely limiting the scope of the question.\(^{50}\) But this is not always possible and it may be more satisfactory, if there is a real problem to be solved, to allow the referring court to make a second reference identifying what it is.

In the hope of detecting problems of admissibility 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. But it has already avoided some problems.

**The Preliminary Report**

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,\(^{51}\) is to tell the other members of the Court what the case is about and to make recommendations as to how it should be dealt with. Normally, after a brief introduction which seeks to encapsulate the point of the case, the

\(^{49}\) Would it, e.g., 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 (Cases 104/79 and 244/80 Foglia v. Novello [1980] ECR 745 and [1981] ECR 3045), 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 (Joined Cases C-320, 321 and 322/90 Telemarsiabruzzo [1993] ECR I–393), 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 (Case 83/91 Meilicke [1992] ECR I–4871)?

\(^{50}\) See, e.g., case C-289/91, Kühm, [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).
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 General Meeting

The Court (judges, advocates general and registrar) used to hold "Administrative Meetings" to deal with problems of administration and to consider the Preliminary Reports in cases ready for hearing. Now, all administrative matters have been devolved to committees, and a "General Meeting" is held every Tuesday evening to deal with Preliminary Reports.

The most important point to be decided at the General 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 approach suggested by Article 165 of the Treaty (second paragraph) 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 Member States and the institutions may insist that a case be dealt with in plenary session, but this happens very rarely.

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. At the moment, three days of the week are given over to plenary hearings and deliberations, as compared with one day a

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52 If the Advocate General seriously disagrees with the Rapporteur, he will set out his views in a separate note for the Court.
54 Treaty, Art. 165, third para.
week for chambers, yet the chambers deal with as many cases. Many more cases could be dealt with more quickly if they were heard by chambers. It is also easier for a bench of three or five judges to engage in active discussion of the case with those appearing than it is for a bench of eleven or fifteen.

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. Also, where a chamber finds that a case raises points of principle that ought to be dealt with by the plenary, there must then 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 tendency, at the stage of the General Meeting to maintain a case before the plenary, or at least the petit plenum, if there is a serious risk that a chamber would find itself unable to decide it.

In these discussions, and in the deliberations later, the role 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 General 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 oral pleadings. To an increasing extent, the Court prefers to put questions in writing for written reply, rather than reply on improvised answers given at the oral hearing.

Assuming that no substantial preparatory inquiries are necessary, the oral hearing will be fixed for a date some six to eight weeks ahead. The Report for the Hearing is distributed as soon as the necessary translations are ready.

The oral hearing

Plenary hearings are held on Tuesday and Wednesday mornings, continuing if necessary in the afternoon. At the stage of the General Meeting, the length

55 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 eight months. Case C-46/90, Lagauche, began on February 28, 1990 and was referred back to the plenary by a chamber on February 25, 1992. By that time
of the hearing cannot be predicted with precision. Two cases will be listed for each day if they seem reasonably straightforward, otherwise only one. Chamber hearings are held on Thursday mornings and, quite often, Thursday afternoon.

If the language of procedure is one that the judges and pleaders can understand without interpretation (i.e. French, to a lesser extent English and, before certain chambers, German), the oral hearing can become quite a lively event, with a ready exchange between bench and bar. To the extent that interpretation is necessary, spontaneity is lost since an interpreter, however skilled, can rarely convey 100 per cent of what is said or, often quite as important, the nuances of how it is said. It is also exceedingly difficult for the listener to concentrate for more than a short space of time on an argument presented through an interpreter.

Nevertheless, if the pleaders allow for the constraints of pleading through interpreters, the oral hearing can contribute greatly to the judges' understanding of the case and appreciation of the issues. The least useful, and certainly the most boring, form of oral pleading consists of the pleader reading from a prepared text in which he merely repeats points already made in writing and takes no account of what has been said by others. Unfortunately, this is also a common form of oral pleading before the Court. The judge will be lucky if the interpreter can convey more than 75 per cent of what is being said, since reading from a prepared text is notoriously the most difficult form of presentation from which to interpret.

In order to limit the time spent in oral hearings and encourage pleaders to focus their arguments, the Court has imposed a time limit on speeches. In general, the pleader is allowed 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 interruptions. After each advocate has spoken, the President invites the Rapporteur, the Advocate General and then any other judge to put questions.

Dispensing with the oral hearing

When the Rules of Procedure were revised in 1991, the Court was empowered 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; 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 October 27, 1993 ([1993] ECR 1-5267 et seq.).

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.
and in appeals from the Court of First Instance where no party expressly objects.\textsuperscript{59}

There is now no oral hearing in some 15–20 per cent of cases. What would have been the Report for the Hearing is circulated to the parties as the “Report of the Judge Rapporteur” allowing a short period for comment. The case can then go straight to deliberation as soon as the Advocate General has delivered his Opinion.

Dispensing with the oral hearing cuts several months off the time taken to deal with the case. There is no evidence, so far, that the Court has overlooked vital points in consequence.

\textit{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. Judge Grévisse described the deliberation as “the heart of our work”.

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 \textit{starting point} for the Court’s deliberation even if, in many cases, the end result turns out to be 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 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

\textsuperscript{59} RP, Art. 120.
weekend or well into the night. Deliberations of the chambers normally take place on Thursday after the hearings for the day have been completed.

It is some measure of the workload of a judge of the Court of Justice that, in an average week, he will attend 3–5 oral hearings, take part in deliberation of 5–7 cases and discuss 8–10 cases at the General Meeting on Tuesday evening. That is in addition to his own reading and drafting work.

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 common law approach allows (indeed encourages) the expression of individual opinions, including dissenting opinions. The collegiate approach means 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.

A disadvantage of the collegiate approach is that the judgment may simply cloak an inability to reach a clear decision. A camel is said to be a horse

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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 a rather informal committee meeting.
designed by a committee, and some judgments of the Court of Justice are camels. Some commentators\textsuperscript{61} believe that the Court's work product would be better if dissenting opinions were allowed.

\textit{Dissenting opinions}

The argument usually advanced against dissenting opinions is that 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. Given the recent attitude of certain Member States, this danger may be greater than it used to be. On the other hand, the Advocates General regularly deliver Opinions which may be unwelcome to their Member State of origin and there is not the slightest evidence of their being compromised.

There are, however, other problems. In the common world, the possibility of dissent normally arises only in appeals, where there has already been a judgment in the court below and the arguments have been fully canvassed in oral debate. The issues are pretty clear at that stage, and the minority know what they are dissenting from.

By contrast, except in appeals, the Court of Justice is acting as a court of first and last instance. As has been explained above, the point at issue often becomes clear only in deliberation and it is important that all judges participate until the point has been identified.

So it would not be possible for a conscientious judge to decide whether to dissent until the judgment had reached its final form. Moreover, he would have to write his dissenting opinion in such a way as not to reveal how the arguments developed in the course of the deliberation. This would take time and a great deal of care.

Introduction of dissenting opinions would also involve a change of style for the majority judgment since the majority would wish to explain their position vis-à-vis the dissenter(s). The majority judgment would therefore take longer to agree and longer to translate. Delivery of the judgment would have to be delayed until both the majority and dissenting opinions were ready and translated.

It is not self-evident, to the present writer at any rate, that the merits of dissenting opinions and their contribution to the evolution of the Court's case law would outweigh the disadvantages of further serious delay in producing judgments, particularly 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 "abstentionist" and so on) in the style of some other courts.

This has not happened so far. Indeed, to a relative newcomer, one of the most impressive, and in some ways most unexpected, features of the Court has been its relaxed, non-confrontational way of working. Every deliberation in a difficult case produces some surprises in the attitudes and votes of colleagues—the predictable does not happen and the unpredictable does.