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## **COMMENTS BY THE CCBE ON THE REFORM OF THE RULES OF PROCEDURE OF THE GENERAL COURT**

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The General Court has informed the CCBE that it intends to revise its Rules of Procedure and has invited the CCBE to submit comments. The CCBE is grateful for this opportunity and would like to submit the following comments.

### **1. General observation**

We understand that the main purpose of the revision of the Rules of Procedure is to improve the efficiency of proceedings before the General Court and to align the Rules of Procedure with those of the Court of Justice, while taking into account the different nature of the proceedings before the General Court. The task of the General Court is indeed a different one in that it has to deal with complex and labour intensive cases, raising extensive issues of fact and evidence, as well as important issues of law. It plays in that regard a fundamental role in providing judicial protection as required by the Treaty and the EU Charter of Fundamental Rights.

The CCBE agrees with these general objectives, and would emphasize that the differences between the two jurisdictions mean that not all aspects of the Court of Justice's Rules of Procedure are suitable for the General Court. In addition, it is worth pointing out that, in the CCBE's view, the cause of the current bottleneck in proceedings before the General Court is not the current Rules of Procedure as such: moreover, the current Rules of Procedure already provide the Court with several tools for active and efficient case management. In a similar vein, some of the means suggested below to increase the efficiency of proceedings before the Court do not require a change in the Rules of Procedure.

### **2. No binding page limits**

The new Rules of Procedure of the Court of Justice provide for the possibility to impose binding page limits. The CCBE is opposed to such binding page limits because they are incapable of taking account of the circumstances of individual cases.

This concern is particularly important in the context of litigation before the General Court. While in a simple case, 50 or 25 pages (as suggested in the current Practice Directions) may be too much, in complex cases 50 or even 100 pages may not allow the parties to comprehensively address the relevant legal and factual issues concerning the challenged act. In this context it may be observed that it is not uncommon for Commission decisions in complex competition matters to run to several hundred single-spaced pages with over 1000 paragraphs and footnotes. Often these decisions are supplemented by lengthy annexes setting out, for example, detailed economic analysis. Also, the administrative files often contain several thousand pages and documents. Requiring an Applicant to challenge such decisions in a 50 or even 100 page Application would seriously affect the right to judicial review and is not in the interest of the General Court either. It either amounts to a denial of the right to challenge all relevant aspects of the decision or forces the Applicant to be so brief that its application will be incomprehensible. This is particularly the case if the case raises extensive and complex issues of law and fact.

Also, in many cases, the intervener has at least the same "quality" of interest in the outcome of a case as the main parties (e.g., challenges by a competitor to a Commission decision approving a concentration to which the intervener is party, or approving State aid to the intervener). In such cases a binding 25 page limit for interventions would affect access to justice.

Thus, while the CCBE is opposed to binding page limits as a matter of principle, it is particularly anxious to ensure that the solution envisaged by the Court of Justice should not be extended to the General Court.

Any indication of the appropriate number of pages should only provide guidance. This guidance should be provided in a non-binding document (such as the current Practice Directions) and should not be prescribed by the Rules of Procedure.

### **3. Active case management**

The CCBE believes that more active case management early in the procedure could greatly enhance the efficiency of proceedings. This could be done, in particular, through a more intensive use of measures of organization of procedure and measures of enquiry (Articles 64 to 65 of the Rules of Procedure). The main purpose of these measures should be to focus the proceedings on the key factual and legal issues in dispute and to clarify the facts and solve factual disputes early in the proceedings. The following could be useful:

- The Rules of Procedure should provide for the possibility to hold case management meetings between the judges and the parties remotely, for example by telephone or video conference. The simplicity and interactive character of a telephone conference would make active case management a meaningful tool for the Court to focus and shorten procedures.
- After the first round of written pleadings, the main parties could be granted the right to request a meeting – for example, by telephone – to propose and discuss measures of organization of procedure. Reference to this possibility could usefully be inserted into the section in the Rules of Procedure on the written procedure, after the current Article 48.
- The possible organisation measures should be expressly extended to include the adoption of a timetable for the various stages of the written procedure, the oral hearing and the judgment.
- Applications to intervene should be dealt with as early as possible, and Statements in Intervention lodged immediately after the Defence. The Applicant would thus address the Defence and the Statements in Intervention in its Reply, and the Defendant would respond with a comprehensive Rejoinder. This would avoid a multiplication of written observations, and would simplify the work of the Court in understanding the positions of the main parties on the issues in the case.
- After the submission of the Defence, the Court could more regularly indicate the points on which it would like the parties to focus on in the second round of pleadings and ask questions concerning any factual or legal points that are unclear. This need not require a written communication from the Court – the Court may find it much more convenient and useful for such guidance to be conveyed orally, in person or by a telephone conference with the parties.
- The Court could communicate to the parties, as far as practical, the issues on which it intends to focus at the oral hearing in advance of the hearing. This need not be the exact questions – even an indication of the major areas for discussion is likely to lead to a more productive hearing.

See for example the views expressed in a recent talk by the Registrar of the UK Competition Appeal Tribunal:

“... it is our experience that regular and frequent contacts between the Tribunal and counsel are indispensable in moving complex matters efficiently toward final resolution. Generally the Tribunal is copied in on nearly all the correspondence between the parties and participates in a daily active discussion on the best and most efficient way to prepare the case for hearing. In operating this system, we try to bear in mind that effective judicial management should be active, a creative force that steers the parties towards a reasonable assessment of the evidentiary needs and strengths and weaknesses of their case. It should not be so rigid as to stifle cooperation between the parties and should build upon their attempts at co-operation. The Tribunal also tries to ensure that its judicial control is well informed – the degree and type of such control being tailored to the particular circumstances of each case. Each case has to be viewed organically and discretion exercised in such a manner that seeks to apply managerial techniques that are reasonable and appropriate.”

#### **4. Automatic treatment of Objections of Inadmissibility**

Objections of inadmissibility were originally intended to enable the Court to save time and resources, by terminating obviously inadmissible cases at an early stage. Unfortunately, on an increasing number of occasions, they are leading simply to additional delay. Once the Applicant's observations have been submitted, it is often months – and sometimes years – before the matter is resolved by joining the issue to the substance. The case then starts again from the Defence, with nothing having been achieved but delay.

In the CCBE's view, an appropriate solution would be for the Rules of Procedure to provide that the Court informs the parties when the written procedure on the Objection to Admissibility is closed (either with lodging of the Applicant's Observations or the lodging of the parties' Observations on a possible statement in intervention. Unless the Court informs the parties within four months of that date to the contrary, the Objection to Admissibility is deemed to have been joined with the substance, and the deadline for the submission of the Defence will start to run automatically at the end of that four-month period. This would enable the Court to retain full control of the situation, while at the same time prevent unnecessary delay, thereby preventing the Objection of Inadmissibility from being used as a litigation tactic.

#### **5. Simplifying the language rules**

The CCBE recognizes that the language rules of the General Court are intended to reflect important considerations relating to the nature of the European Union. Nonetheless, in the CCBE's view, certain improvements can be made, consistent with those considerations. In this context, it is worth recalling the point made earlier, that interveners may have at least the same "quality" of interest in the outcome of a case as the main parties.

First, interveners should be entitled to use an official language of their choice at the oral hearing. This small but fundamental change would enable interveners to use their normal lawyer, who speaks their language, in a case that may be of fundamental importance for the intervener. Given that the European Union now contains a large number of languages, it cannot be assumed that lawyers or interveners speak the language of the Applicant. Intervenors' access to justice is directly affected by their ability to use their own language at the hearing, and this can be accommodated with little inconvenience to the Court.

Second, the rule at Article 35(3) of the Rules of Procedure, requiring translations of all annexes into the language of the case, should be reformed to reflect the Court's actual practice. This is particularly important where the administrative procedure before the Commission has been conducted in one language, but the language of the case before the Court is different – for example, because it represents a challenge by a competitor of the beneficiary of the decision, from another Member State. It should be possible to lodge annexes in their original language, subject to a right for the Court to require translation into the language of the case, and for the main parties to request the Court to require such a translation.

Third, the CCBE is supportive of any efforts within the Court to use whatever working language is most convenient for the formation giving judgment. The CCBE's priority is to secure the fastest possible treatment of cases before the Court, consistent with the proper administration of justice.

#### **6. Amicus curiae briefs**

The General Court has long recognized the value of interventions by representative associations, when dealing with cases raising questions of principle. However, the requirement for interveners explicitly to support the conclusions of one or other of the main parties often inhibits such associations from seeking to participate, and may also lead to wasted time dealing with questions relating to the "interest" of the intervener.

A possible solution, which the CCBE invites the Court to consider, would be to introduce the possibility of *amicus curiae* briefs in the Rules of Procedure as a possible measure of organisation of procedure. An *amicus curiae* brief might simply be admitted into the case-file as a document to which the parties and the Court could refer if they wished. It need not give the author any right to be represented at the

hearing – unless the Court specifically invited the author to attend the hearing and be represented by a lawyer for that purpose.

## **7. Increased transparency on the status of cases**

In the current system, the parties are only informed to which chamber a case is assigned, but they do not know (1) who is the reporting judge (parties only learn that when they receive the report for the hearing); (2) the current status of the proceedings; (3) when a *rapport préalable* has been made; or (4) when a hearing is expected to take place.

This lack of transparency seems inappropriate in the modern age. In many national courts, the proceedings are far more transparent. The CCBE believes that, from an early stage in the procedure, the Court should publish on its website the name of the reporting judge, the chamber to which the case has been assigned, and an indicative timetable for the receipt of the various observations, the hearing and the judgment. In the CCBE's view, the public today expects such information to be readily available. If it must be limited to the parties, then the information could for example be provided on a page within e-Curia, which would be updated as needed.

## **8. Obligation to inform the other parties in advance of unforeseeable submissions at the hearing**

It sometimes arises that a party seeks to introduce late evidence into the case-file at the oral hearing. At that point, the other parties are put in the unfair position that they need to argue about the admissibility and substantial content of the documents or oral statements without a proper opportunity to consider the documents. The CCBE recommends that the Rules of Procedure contain a requirement that such documents or statements be provided to the Court (and served by the Court on the other parties) sufficiently far in advance of the hearing so as to afford a reasonable opportunity to consider their contents. This also will avoid the need to allow other parties to comment in writing on such documents or statements after the oral hearing.

Occasionally, a party will surprise the other parties and the Court by, for the first time at the hearing, claiming that some piece of legislation or case-law is of major importance for the resolution of the case. The CCBE recognizes that hearings are inevitably held several months after the close of the written procedure, and it is the advocate's responsibility to update themselves on the intervening case-law. Nonetheless, a party that introduces new legislation or case-law at the hearing without having informed the Court and the other parties in advance not only acts unfairly, but makes it impossible to have an informed debate at the hearing about such legislation or case-law. Accordingly, it would be appropriate for parties to inform the Court of their intention in this respect, and for the Court to notify the other parties thereafter.

To alleviate problems that may arise from time to time, it would also be very useful if the court rooms were set up in such a way that advocates were able to consult case-law and legislation on-line during the hearing.

## **9. Recordings of the hearing should be made available**

The parties should have the possibility to obtain a copy of the recording of the hearing (i.e. the audio file), or indeed an official transcript. Currently, the Registry systematically refuses to communicate to the parties the recording made of every hearing or the transcript. The minutes of the hearing are short, formal documents that are not intended to record information other than basic procedural items such as when the hearing started and when it ended, who pleaded and sometimes whether a ground of appeal was dropped, etc.

The importance of knowing precisely what was said at the hearing (and thus of having access to the recording) has increased in recent years given that the General Court, especially in competition cases, discusses many important factual issues at the hearing only. In some cases, the hearing may even be viewed as a substitute for measures of enquiry.

Without having access to the recordings or a transcript, the parties have no efficient means of proving on appeal to the Court of Justice what they or the other parties said at the hearing before the General Court, including references to important factual issues that were discussed at the hearing only. In theory, they might commission a court reporter to attend the hearing. Apart from the needless additional expense, this would not eradicate disputes arising between the parties. The solution is simple. The recording of the hearing should simply be made available on the Court's website and provided to the parties through e-Curia.

The making available of the recordings of the hearing to the wider public is also what one would expect nowadays as a matter of transparency in the particular situation of the EU courts, as it is in practice not possible for EU citizens to travel to Luxembourg to attend EU Court hearings.

### Closing Remarks

One point arising from modifications to the rules of procedure is that an in-house training programme on procedural issues for judges, officials in the Registry, référendaires and other staff is an indispensable part of any changes. It is important that all are aware of what is working well and what is not working so well. All efficient judiciaries rely heavily on in-house training to capitalise on successful case management strategies. Experience suggests that such events are also important in building a positive *esprit de corps* to move an institution forward.

In addition Judge Dehousse's comments<sup>1</sup> with regard to the need for an activity report from each judge are respectfully endorsed, albeit that such reports would need to be more frequent than at the end of each mandate. It would also be likely to be useful if each new judge had a judge-mentor for the first three years who meets regularly with the new judge and who reviews activity reports with the new judge.

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<sup>1</sup> *Reform of the EU Courts*, §3.2(b).