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Notes for the guidance of Counsel in written and oral proceedings before the EFTA Court

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Introduction

The procedure before the EFTA Court may be unfamiliar to many lawyers since it differs from the procedures before their national courts.

The language of the EFTA Court is English. Accordingly, all decisions and the reports for the hearing are written in English. In the case of judgments in preliminary reference procedures[1], the report for the hearing and the judgment are translated into the language of the requesting national court. Both language versions are authentic. When an advisory opinion is published in two languages, the different language versions are published with corresponding page numbers to facilitate reference.

The operation of the Court is governed by several international instruments. Article 108(2) of the EEA Agreement prescribes the establishment of the Court and describes its main functions. However, the instrument formally establishing the Court is the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA"). Protocol 5 to that Agreement contains the Statute of the Court. On the basis of the SCA, the Court's Rules of Procedure (hereinafter "RP") were adopted by the Court and approved by the EFTA States. A publication containing all these instruments, *EFTA Court Texts*, may be obtained in English, German, Icelandic or Norwegian from the Registry or at the Court's website.

The procedures of the Court are, as a rule, modelled on the corresponding procedures of the Court of Justice of the European Union (hereinafter the "ECJ"), also seated in Luxembourg. However, the Court is not subdivided into several instances and it only sits in a formation of its three judges. The Court is not assisted by an Advocate General. This, together with different language regime, constitutes the main procedural differences between the Court and the ECJ.

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[1] The formal term used in the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and in the Court's Rules of Procedure is advisory opinion.

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A. General points

1. The various types and stages of the Court’s proceedings

Apart from certain special forms of procedure, the procedures before the Court are of two main kinds:

(1) Direct Actions;
(2) Preliminary References

Direct Actions are initiated with an application lodged directly at the Court by an EFTA State, the EFTA Surveillance Authority or an individual or an economic operator (see Article 31, 32, 35-27 SCA). *Preliminary References* are submitted to the Court by national courts for the interpretation of EEA Law, as part of their procedures, (see Article 34 SCA).

Proceedings before the Court consist of two parts, a written part and an oral part (Article 18 Statute). The *written procedure* consists of the communication to the parties of applications, statements of case, defences and observations, and of replies, if any, as well as all supporting papers and documents. The *oral procedure* consists of the presentation of the report presented by a Judge acting as Rapporteur, the hearing by the Court of lawyers, agents and advisers as well as the hearing, if any, of witnesses and experts.

Cases before the Court often have a general significance for the interpretation of the EEA Agreement which may be of interest for all the Contracting Parties to the EEA Agreement. They may also involve questions which are relevant in the interpretation of EU law by the Union courts. Hence, the Registrar notifies the Governments of all the EEA States, the EFTA Surveillance Authority and the European Commission of any case pending before the Court. These parties are entitled to submit statements of case or written observations to the Court and participate in the Oral Procedure (Article 20 Statute). In practice, the EFTA Surveillance Authority and the European Commission participate in all proceedings of the Court.

2. Representation of the parties

a. Direct actions

Article 17 of the Statute requires that parties must be represented by Counsel. The EFTA States, the EFTA Surveillance Authority, Member States of the European Union and the European Commission (generally referred to hereinafter as “governments and institutions”) are represented by their agents, while other parties must be represented by a lawyer authorized to practise before a Court of an EEA State.

The requirement of representation by a lawyer does not apply to applications for legal aid (see A.4.b. below), and, in certain circumstances, preliminary reference proceedings (see Article 97(2) RP and 4.b below). Contrary to the Statute of the Court of Justice of the European Union, there is no provision granting university teachers the right of audience.

Pursuant to Article 33(3) RP, Counsel must, when lodging an application, attach a document certifying that he is authorized to practise before a court of a Contracting Party

to the EEA Agreement. A copy of the lawyer's identity card is accepted for this purpose, although a translation into English may be required if the original document is not in English. Counsel must, moreover, provide the Court with a document, usually in the form of a Power of Attorney, certifying that Counsel is authorized to represent the party he or she purports to represent (Article 33(5) RP). All documents must be submitted in English or accompanied by a translation into English (Article 25(3) RP).

b. Preliminary reference procedure

The representation requirement differs slightly in preliminary reference proceedings inasmuch as any person empowered to represent or assist a party in the proceedings before the national court may be allowed to do so before the Court. Consequently, if the rules of procedure applicable to proceedings before the national court do not require the parties to be represented by Counsel, they will be entitled to represent themselves (Article 97(2) RP).

In preliminary reference cases, the Power of Attorney requirement is dispensed with in respect to the parties to the case, as it is assumed that the national court has verified and accepted Counsel.

3. Use of languages

The rules pertaining to the use of languages differ from those pertaining to the procedure of the ECJ. Thus, the official language of the Court is English. This means that (1) the working language of the Court is English and (2) English is the language of each and every case. English will therefore cover the whole procedure including deliberations, minutes and decisions of the Court (Article 25 (1) RP).

English is used in the written and the oral part of the procedure by the parties, the interveners, the EEA States, the EFTA Surveillance Authority and the European Commission (Article 25(2) RP). All supporting documents must be submitted in English or accompanied by a translation into English. The Court may decide otherwise or allow a translation to be confined to an extract (Article 25(3) RP).

In *direct action* cases, the Court may upon request, if deemed necessary, allow a party or intervener to address and be addressed by the Court in an official language of an EEA State or of the European Communities in the oral part of the procedure. This exemption does not apply to the written part of the procedure. Furthermore, a request to this effect shall be submitted at least *two weeks in advance* of the oral hearing (Article 25(4), but preferably much earlier. It should be stressed that this provision does not apply to the EEA States, the EFTA Surveillance Authority or the European Commission. Consequently, the EU Member States are also to use English before the Court.

Where a witness or expert states that he is unable adequately to express himself in English the Court may authorize him to give his evidence in another language. The Court shall arrange for interpretation to and from English. Such a request shall normally be submitted at least two weeks in advance of the oral part of the procedure (Article 26 RP).

In *preliminary reference* proceedings, the national courts are entitled to submit requests for advisory opinions and supporting documents in their own language. The Court is responsible for the translation of the request into English (Article 27(1) RP). In

preliminary reference cases the parties to the dispute before the national court may also submit their written observations in the language of the case before that court. In preliminary reference cases, the Report for the Hearing, prepared by the Judge-Rapporteur, is in English and the language of the proceedings before the national court (Article 27(3) RP).

Parties to the dispute are entitled to address and be addressed by the Court in the language of the dispute in the national court upon the condition that they inform the Court at least *two weeks prior* to the hearing, but preferably much earlier, that they wish to avail themselves of that possibility (Article 27(4) RP). All other parties must, as a rule, address and be addressed by the Court in English. It should be stressed that the Court does not have the discretion to allow the EEA States, the EFTA Surveillance Authority or the Commission to plead in another language than English.

In practice those appearing before the Court generally prefer to use English, even those who are entitled to use a different language. By using English, interpretation is avoided which contributes to fluid and spontaneous proceedings. However, since English will usually not be the native language of neither the Judges nor the other pleaders, it is highly advisable to speak clearly and avoiding using long and complicated sentences. (for oral pleadings, see further C.4).

Judgments for advisory opinions are given in English as well as the language of the national proceedings. Both language versions are authentic.

4. Costs and legal aid

a. Costs

Proceedings before the Court are free of charge inasmuch as no charges or fees of any kind are, as a rule, payable to the Court. The costs referred to in Article 66 *et seq.* RP are restricted to "recoverable" costs, i.e. remuneration of parties' agents, advisers and lawyers, including their travel and subsistence expenses, and expenses of witnesses and experts (Article 69 RP).

In *direct action* cases, the unsuccessful party is ordered to pay the costs, meaning that it bears its own costs and those of the other parties, except for governments and institutions, which bear their own costs. The Court may, depending on the circumstances of the case, order that the parties bear their own costs wholly or in part or even award costs against the successful party. For costs to be awarded, the successful party must have included a request to that effect as one of the orders sought. If no such request is made, the parties bear their own costs (Article 66 RP).

In *preliminary reference* cases, the costs of the parties to the dispute are a matter for the national court to rule on (Article 97(5) RP). Thus, in its judgment for an advisory opinion, the EFTA Court simply refers the decision on this matter to the national court that made the reference. It follows that governments and institutions submitting written or oral observations before the Court, without being parties to the national proceedings, will bear their own costs.

b. Legal aid

Article 72 RP provides for the possibility of legal aid. A party may, at any time, apply to the Court for legal aid if it is “wholly or in part unable to meet the costs of the proceedings”. The right to make such an application is not conditional upon the nature of the action or procedure. Thus, legal aid may be applied for in preliminary reference proceedings, although the party concerned must first seek legal aid from the competent authorities at the national level. In order to establish lack of means, the party concerned must provide the Court with all relevant information, in particular a certificate from the competent authority to that effect.

When legal aid is applied for before the commencement of proceedings, the party concerned must give a brief description of the subject-matter of the application in order to enable the Court to assess whether or not the application is manifestly unfounded. The party does not need to be represented by Counsel at the stage of applying for legal aid.

An order granting or refusing legal aid does not state the reasons on which it is based. The granting of legal aid does not exclude the recipient from being ordered to pay the costs in the case. Moreover, the Court may take action to recover sums disbursed by way of legal aid.

B. Written procedure

1. The purpose of the written procedure

Regardless of the nature of the proceedings (direct action or preliminary references), the purpose of the written procedure is always the same, *viz.* to put before the Court an exhaustive account of the facts, pleas and arguments of the parties and the forms of order sought. It is stressed that the written phase of the proceedings is the *principal part of the proceedings* before the Court. The oral hearing is essentially to supplement the written pleadings, not to substitute it.

The entire procedure before the Court, including the written phase, is governed by the principle whereby new pleas may not be raised in the course of the proceedings, with the sole exception of those based on matters of law and fact which come to light in the course of the procedure (Article 37(2) RP).

Accordingly, the procedure before the Court is not characterised by the flexibility which may be the case with regard to certain national procedures.

2. The conduct of the written procedure

The course of the *written procedure* varies according to the nature of the proceedings (Article 32 *et seq.* RP).

In *direct actions*, each litigant may submit two sets of written pleadings: The applicant submits the application and may submit a reply, whilst the defendant may submit a defence to the application and a rejoinder to the applicant´s reply (Article 33-37 RP).

In *direct actions*, the EEA States, the EFTA Surveillance Authority, and the European Commission may (without becoming interveners) within a mandatory period of two months starting from the notification of the pending case, submit written observations (Article 20 Statute).

In *preliminary reference proceedings*, the EEA States, the EFTA Surveillance Authority, and the European Commission may, within a mandatory period of two months starting from the notification of the preliminary reference, submit their written observations (see B.9 below). This also applies to the parties to the dispute before the national courts (Article 97(1) RP).

In either type of case, the Court may require further written information or statements from the parties.

3. Lodging of pleadings

All pleadings must be sent to the Registry of the Court in order to be registered in accordance with Article 32 RP. The original must be signed by Counsel for the party concerned. Copies must be certified by the party lodging them. All documents relied on must be annexed to the relevant pleading, which must be accompanied by a list of annexes.

The original pleading and all the annexes to it must be lodged together with five copies for the Court and, for the purposes of notification (see B.4 below), a copy for every other party to the proceedings.

Any pleading may be delivered by post, courier or by hand during the official opening hours of the Court to the Court´s Registry. The official opening hours of the Court are from 9.00 hrs to 12.00 hrs and from 14.00 hrs to 16.00 hrs Monday to Friday, except on official holidays.[2] Outside the official working hours of the Court, any pleading may be delivered by hand to the security officer at the entrance of the Court's building (colloquially known as the Hemicyclebuilding) who can be contacted 24 hours a day.

If pleadings are sent by post or courier, the envelope must bear the following address:

EFTA Court
- Registry -
1, rue du Fort Thüngen
L-1499 Luxembourg

Pleadings may also be filed with the Registry by electronic mail (eftacourt@eftacourt.int) or by fax (+352 43 43 89). In this case, a signed original of the pleading, accompanied with all supporting documents, must be lodged at the Registry no later than 10 days thereafter (Article 32(5) RP). In practice, electronic mail has become a common way of lodging submissions.

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[2] Official holidays are published annually in the Official Journal. The following days have, until now, been holidays: New Year's Day, Easter Monday, 1 May, Ascension Day, Whit Monday, 23 June (National Day of Luxembourg), 24 June where 23 June is a Sunday, 15 August (Assumption), 1 November (All Saint's Day), 25 December, 26 December.

4. Length of pleadings

Depending on the subject matter and the circumstances of the case, the maximum number of pages shall be as follows:

- 50 pages for the application and defence;
- 25 pages for the reply and the rejoinder;
- 20 pages for an objection of inadmissibility and observations thereon;
- 20 pages for a statement in intervention and 15 pages for observations thereon;
- 50 pages for written observations submitted under Article 20 of the Statute.

Authorisation to exceed those maximum lengths will be given only in cases involving particularly complex legal or factual issues.

5. Notification

a. The addressees

In *direct actions* the parties concerned are notified of *inter alia* the following: applications, defences, replies, rejoinders, applications for interim measures, applications for leave to intervene (Articles 36, 80 and 89 RP), and written observations.

Preliminary references by national courts are communicated to the parties to the proceedings before the national court, to the EEA States, the EFTA Surveillance Authority and the European Commission (Article 97 RP). The written observations of those entitled to submit those under Article 20 of the Statute, are communicated to the parties to the proceedings before the national court and all those participating in the case before the Court.

In all cases, the Report for the Hearing, with an invitation to the oral hearing, and the Decision/Judgment are sent to all EEA States, the EFTA Surveillance Authority, the European Commission and others.

b. Address for service

In *direct action* cases, Article 33 RP states that parties are to give an address for service in Luxembourg. The address given may be that of any natural person residing in Luxembourg, with the exception of officials of the EFTA Court. The same rule applies for interveners (Article 89(1)(d) RP). In such cases, due notification is deemed to take place upon receipt of the document in question by the person whose address has been given as the address for service.

As well as, or instead of, giving an address for service, the lawyer or agent for a party may consent to service by fax or any other technical means of communication (in practice, electronic mail). In such cases, procedural documents, other than judgments and orders, will only be sent by electronic mail or fax and shall be deemed to have been duly served when such means are used.

However, for technical reasons or on account of the nature or length of the document concerned, transmission by electronic mail or fax is not feasible, it will be sent to the party's address for service in Luxembourg or, if no address for service has been given, by registered mail with a form for acknowledgment of receipt to the address of the

party's lawyer or agent. The lawyer or agent will be informed by electronic mail or by fax that the document has been sent by these means and the postal dispatch shall be deemed to have been delivered to its addressee on the tenth day following the day on which it was lodged at the Luxembourg post office, unless it is shown by the acknowledgment of receipt that it was received on another date or the addressee informs the Registrar, within three weeks of being advised of the dispatch, that it has not reached its addressee (Article 75(4) RP).

A lawyer or agent who consents to service by fax or any other technical means of communication must indicate his fax number or electronic address. If no address for service in Luxembourg is given or if a party's lawyer or agent does not consent to service by fax or any other technical means of communication, procedural documents shall be sent by registered mail to the address of the lawyer or agent in question and, in such cases, due service shall be deemed to have been effected by the lodging of the dispatch at the Luxembourg post office.

In *preliminary reference proceedings*, there is no obligation to give an address for service. Service is thus effected by registered mail with a form for acknowledgement of receipt. A party may, however, expressly consent to service by fax or any other technical means of communication (in practice, electronic mail). In such cases, service will be carried out in accordance with the procedures described above.

6. Procedural time limits

Procedural time limits are calculated in accordance with Article 76 *et seq.* RP.

a. Serving of documents

A period which starts with the service of a pleading starts from the time when the document is either dispatched by registered mail with a form for acknowledgement of receipt or by personal delivery of the copy against a receipt (Article 75 (2) RP). Where the addressee has agreed that service is to be effected on him by electronic mail or fax, any procedural document other than a judgment or order of the Court may be served by the transmission of a copy of the document by such means (Article 75(4) RP).

Where a document is to be served on an EEA State, the EFTA Surveillance Authority, or the European Commission, service is effected on the day on which their permanent delegation in Luxembourg is notified by mail or by fax that the document is available at the Court (Article 75 (1) RP). Since these parties have generally agreed to service to be effected by electronic mail or fax, documents are in practice, served by electronic mail.

The day on which the document is received or sent is not included within the time limit (Article 76(1)(a) RP). Further rules on the calculation on time limits are stipulated in Article 76(1) RP.

b. Calculation of time limits for intervention in direct actions

Applications in direct actions are published in the *Official Journal of the European Union* and its *EEA Supplement*. The time limit for interventions is six weeks running from the publication of the notice. Consideration may be given to an application to intervene which is made after the expiry of this period but before the decision to open the oral procedure (cf. C.8). In such cases, the intervener will only submit his observations during the oral procedure (Article 89(1) RP).

c. Cessation of time limit

The period within which a pleading must be lodged stops running when the original thereof is lodged, or when the pleading is received by fax or electronic mail by deadline and the original is received within 10 days (see B.3 above).

d. Extension of time limits

Any time limit prescribed pursuant to the RP may be extended by whomever prescribed it (Article 78 RP). However, this only applies to time limits prescribed by the RP and does therefore *not apply* to any time limit pursuant to the SCA or the Statute, cf. in particular the time limit for instigating proceedings (Articles 36 and 37 ESA/Court Agreement) and for the lodging of written observations (Article 20 Statute). The time limit for the lodging of a defence may in exceptional circumstances be extended by the President on a reasoned application by the defendant (Article 35(2) RP). A substantiated application must be made within a reasonable time before the prescribed period expires.

The President decides on all applications for extensions.

Any period of time prescribed by the Agreement, the Statute or these Rules may not be extended on considerations of distance alone (Article 78(2) RP). Hence, (contrary to Article 81 of the RP of the ECJ) there is no automatic extension on account of distance by a fixed period of 10 days.

7. Direct actions

a. Originating applications in direct actions

An application must conform with Articles 32 and 33 RP. Article 33(1) is strictly applied. Failure to observe these provisions and other mandatory conditions may render the application formally inadmissible.

If the application does not comply with the requirements set out in paragraphs 3 to 5 of Article 33 RP (a. Lawyer's certificate to practice; b. relevant documents pertaining to a measure of which annulment is sought; c. documents pertaining to legal persons), the Registrar shall prescribe a reasonable period within which the applicant is to comply with them. If the applicant fails to put the application in order or to produce the required documents within the time prescribed, the Court shall decide whether the non-compliance with these conditions renders the application formally inadmissible. (Article 33(6) RP).

An application must place before the Court all matters of fact and law which justify the commencement of proceedings. At the same time, an application defines the scope of the proceedings. In principle, it is not permitted to raise new issues or add to the forms of order sought in the course of the proceedings (see B.1 above).

b. Summary of pleas and arguments

It is desirable that all pleadings contain a summary of no more than two pages setting out the pleas and arguments put forward. The summary ensures that the pleas and arguments relied on are clearly identified. The summary may also be helpful for the preparation of the text that is published in the Official Journal.

8. Preliminary references

In *Preliminary reference* cases, proceedings before the Court are set in motion by receiving the national court's decision to refer questions concerning the interpretation of the EEA Agreement to the Court (Article 34 ESA/Court Agreement). The order for reference – the form of which is governed by the rules of the national jurisdiction – is forwarded to the Court by the referring national court. The Court has drawn up a Note for Guidance on Requests by National Courts for Advisory Opinions (EFTA Court Notice 1/99). The Note for Guidance will also prove helpful for lawyers who wish to request national judges to make preliminary references and assist them with the formulation of the appropriate questions.

The litigants before the national court are not entitled to make a reference to the Court on their own initiative. Nor may the parties take any action before they are served with a copy of the order for reference and an invitation to submit written observations by the Registry of the Court (see B.2 and B.4 above).

9. Other documents submitted in direct actions

a. Defence

The substantive conditions governing the *defence* are laid down in Article 35 RP. Thus, the defendant must set out all matters of law and fact available to him or her when drafting the defence. Counsel must keep in mind the prohibition of putting forward new pleas in law, which applies to all stages of the proceedings unless fresh matters of fact or law come to light in the course of the proceedings. If a party does, on these grounds, put forward a new plea in law in the course of the proceedings, the other party may be given the opportunity to respond to that plea (Article 37 RP).

b. Reply and rejoinder

The *reply* is intended as a response to the pleas and arguments raised in the defence. Unnecessary repetition of elements of the applications should be avoided. Similarly, the purpose of the *rejoinder* is to provide for an opportunity to respond to pleas and arguments put forward in the reply.

Both replies and rejoinders are subject to the requirements of Articles 36 and 37 RP and may not, as a rule, contain new pleas in law. Lodging a reply or a rejoinder is optional and waiving the right to lodge these documents will generally speed up the

written procedure. An extension of the time allowed for lodging replies and rejoinders is granted only in exceptional circumstances.

c. Summary of pleas and arguments

As for originating applications, it is desirable for all pleadings to be accompanied by a summary of no more than two pages setting out the pleas and arguments put forward.

10. Written observations in preliminary reference proceedings

After receiving a notification from the Registry of a preliminary reference, the litigants before the national court, the EEA States, the EFTA Surveillance Authority and the European Commission may submit written observations (or a statement of a case), within a period of two months. (Article 20 Statute and Article 97(1) RP) The notification will be accompanied with the original version of the reference as well as a translation into English. The two-month time limit for written observations cannot be extended with the exception of reasons relating to *force majeure*.

The purpose of the written observations is to set out succinctly but completely the reasoning on which the answers put to the Court should be based. It is important to bring to the attention of the Court the factual circumstances of the case before the national court and the relevant provisions of the national legislation. The observations may also suggest the answers the Court should give to the questions referred to it.

The participants in preliminary reference proceedings are not entitled to reply in writing to the written observations submitted by others. The Court may, if it deems it necessary, request further clarification or information from the parties but, otherwise, any response to the written observations of other parties must be made orally during the oral procedure. For that purpose, the written observations are communicated to all parties once the written procedure is completed and the necessary translations have been made.

The submission of written observations is strongly recommended since the time allowed for oral argument at the hearing is strictly limited. However, any party, including those who have not submitted written observations, retains the right to participate in the oral hearing and present arguments, in particular responses to the written arguments of others.

11. Stay of proceedings

Pursuant to Article 79 RP, the proceedings may be stayed by decision of the President. In *direct action* cases, the decision is taken after the views of the Judge-Rapporteur and the parties have been heard. In preliminary reference proceedings, the decision is taken without hearing the parties. Whilst the proceedings are stayed, time shall cease to run for the purposes of prescribed time limits.

12. Application for interim measures

Applications for interim measures may only be made in direct actions and only if they are made by a party to the proceedings pending before the Court and relate to those proceedings. The application for interim measures must be made in a separate document and must meet the conditions laid down by Article 80 RP. It may be presented at the same time as the application initiating the proceedings.

Since the applications for interim measures are made as a matter of urgency, applicants are requested to set out succinctly the pleas in fact and law on which their motion is based. The application for interim measures should itself provide all the details needed to enable the President, or as the case may be, the Court, to decide whether the requested measure should be granted.

The application for interim measures shall be served on the other party, and that party may be allowed to submit written observations within a short period. The President decides whether a hearing will be held and whether he will decide the matter or refer it to the full Court.

In cases of extreme urgency, the President may make an order immediately, that is to say, without awaiting written observations from the other party. In such cases, the order is provisional in that it does not bring the procedure on the interlocutory application to an end. The other party is then invited to submit written observations. The final stage is a (second) order concluding the interlocutory proceedings which confirms or amends the first (provisional) order.

13. Expedited procedures and the urgent preliminary reference procedure

For *direct actions*, Article 59a RP states that the President may exceptionally decide – upon application by the applicant or the defendant, after hearing the other party and on the basis of a recommendation by the Judge-Rapporteur – that a case is to be determined pursuant to an expedited procedure. This decision is conditional upon a particular urgency of the case requiring the Court to give its ruling with the minimum of delay. The effects of expedited procedures are certain derogations from certain provisions of the RP.

An application for a case to be decided under expedited procedure shall be made by a separate document lodged at the same time as the application initiating the proceedings or the defence, as the case may be.

Under the expedited procedure, the oral procedure takes on a greater significance. The written procedure is limited to the application and the defence unless otherwise decided by the President (Article 59a(2) RP). It is recommended that those documents be kept as short and concise as possible.

The date of the oral hearing, the holding of which is mandatory under the expedited procedure, will be fixed once the defence has been lodged or – if the decision to adjudicate under an expedited procedure is not made until after the defence has been lodged – is fixed once that decision has been taken.

Article 20 Statute concerning written observations applies under expedited procedures in direct action cases (Article 59a(4) RP).

An expedited procedure is also available in *preliminary reference proceedings* (Article 97a RP).

14. Intervention

Intervention is governed by Article 36(3) Statute and Article 89 RP. It is only applicable to direct actions (an intervener in the national proceedings would automatically be considered a party, not an intervener, to preliminary reference proceedings before the Court). The forms of order sought in the application to intervene must be limited to supporting the arguments of one or other of the parties. Hence, the intervener must accept the case as it stands at the time of intervention (Article 89(4) RP).

The procedure for the intervention consists of two parts:

(a) The application for leave to intervene;
(b) The actual participation of the intervener in the proceedings.

a. Application for leave to intervene

A party wishing to intervene must submit an *application for leave to intervene* (for time limits, see section 5.b). That document must contain all the information needed to enable the President or, as the case may be, the Court, to make an order granting leave to intervene. Before the order is issued, the parties are invited to submit written observations and, in exceptional cases, oral observations, as to whether or not intervention should be allowed. At the same time, the parties may be asked to inform the Court whether they intend to avail themselves of the right of confidentiality (Article 89(3) RP).

b. Participation of the intervener in the proceedings

Once leave to intervene has been granted, the intervener is invited to submit a *statement in intervention* within a certain time limit. The statement in intervention may be followed by observations from the parties.

15. Practical advice

a. Drafting and lay-out of pleadings

The basic formal requirements for pleadings are set out in Article 33 RP. The basic substantive requirement for pleadings is for them to be clear, concise and complete. Repetition is to be avoided. The Court should be able, on a single reading, to apprehend the essential matters of fact and law.

Since pleadings are read by people of different nationalities and do sometimes have to be translated into English, Counsel should use clear and articulated language and avoid any national or local jargon.

Counsel should also remember the strict rule concerning the introduction of fresh pleas in law (see B.1 above). It follows that Counsel cannot "reserve", not even conditionally, pleas or arguments for subsequent pleadings or the hearing.

The structure of pleadings should be clear and logical and they should be divided into separate parts with titles and paragraph numbers. In complex cases, in addition to the summary of the pleas in law and arguments, a table of contents may be useful.

b. Pattern of originating applications

Originating applications should set out:

– the details of the type of dispute involved and the kind of decision sought: action for annulment, application for interim measures, etc.;

– a brief account of the relevant facts;

– references to relevant provisions of the EEA Agreement and to secondary EEA legislation;

– all the pleas in law on which the application is based;

– the arguments in support of each plea in law; they must include relevant references to case law of the ECJ and the Court; in complex cases, Counsel may want to add references to academic writings and case law of national high courts of EU and EFTA States and, as the case may be, of other jurisdictions.

– the forms of order sought, based on the pleas in law and arguments.

It is desirable for the *defence* and similar documents to follow closely the structure of the reasoning set out in the pleadings to which they constitute a response.

c. Pattern of written observations

Written observations in *preliminary reference proceedings* should set out:

- the relevant facts of the case and applicable national law;
- the relevant provisions of EEA Law;
- legal arguments, including relevant references to case law of the ECJ and the Court; in complex cases Counsel are encouraged to add references to case law of national high courts in EU and EFTA States.
- proposals for answers to be given by the Court to the questions submitted by the national court.

If a party accepts the facts of the case as set out in the order for reference, a reference to the order will suffice.

d. Documents annexed to pleadings

Pursuant to Article 32 (3) RP, documents relied on by the parties must be annexed to the pleadings. Unless there are exceptional circumstances and the parties consent, the Court will not take account of documents submitted outside the prescribed time limits or produced at the hearing.

Only relevant documents, on which the parties base their arguments, must be annexed to the pleadings. Where documents are of some length, it is not only permissible but indeed desirable, for only an extract to be annexed to the pleading whereas a copy of the complete document should be lodged at the Registry.

Since annexes are not translated by the Court unless a Judge or the Registrar so requests, the relevance of every document must be clearly indicated in the body of the pleading to which it is annexed.

The Court does not accept notes on which oral argument is to be based for inclusion in the case-file.

Counsel may in all cases send unofficial translations of pleadings and annexes.

e. Facts and evidence

The initial pleadings must indicate all evidence in support of each of the points of fact at issue. However, new evidence may be put forward in a reply or rejoinder (in contrast to the rule excluding new pleas in law), provided that adequate reasons are given to justify the delay (Article 37(1) RP).

The various forms of evidence upon which parties may rely are set out in Article 50 RP.

f. Citations

Counsel are requested, when citing a judgment of the Court, the ECJ, the EU General Court, the EU Civil Service Tribunal or any other court, to give full details, including the names of the parties or, at least, the name of the applicant. In addition, when citing a passage from a judgment or from an opinion of an Advocate General of the ECJ, they are requested to specify the page number and the number of the paragraph in which the passage in question is to be found ("pin cite").

To facilitate its work, the Court suggests as an appropriate form of citation that is used in the judgments of the Court, ECJ, the EU General Court and the EU Civil Service Tribunal, for example:

> For the Court: Case E-4/07 *Þorkelsson* [2008] EFTA Ct. Rep. 2; or, for cases not yet published: Case E-8/97 *TV 1000 Sverige* , judgment of 12 June 1998, not yet reported.
>
> For the ECJ: Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411.
>
> For the General Court: Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1.

C. Oral procedure

1. Preparation for the hearing

Once all pleadings have been lodged by the parties, the Judge-Rapporteur prepares a preliminary report within a time limit fixed by the President. In the report he will propose any procedural or preparatory measures to be taken by the Court and also whether to dispense with the oral procedure.

In practice, the time limit fixed by the President for the preliminary report is automatically set at four weeks and the President will only make a decision for a different time limit upon a request from the Judge-Rapporteur. If no written preliminary report is submitted by the Judge-Rapporteur at the end of the time limit (be it automatic or set by a special decision), it is presumed that the Judge-Rapporteur proposes the oral procedure to be opened without any prior procedural or preparatory measures. In these cases, the expiry of the time limit for the preliminary report will automatically constitute the opening of the oral procedure. However, the President may always fix another date for the opening of the oral procedure.

After the opening of the oral procedure, the exact date for the hearing is decided by the President and communicated by the Registry to the parties.

Although the oral procedure has been opened, it is not excluded that preparatory measures may be prescribed by the Court (Article 49(4) RP).

Oral testimony and the hearing of experts would usually coincide with the oral hearing although this may also happen earlier in the procedure.

a. Preparatory measures

The Court decides on any preparatory measures to be taken, on a proposal from the Judge-Rapporteur (Article 49 RP). These measures may *inter alia* consist in asking the parties to provide better particulars of the form of order sought by them and of their pleas in law in order to clarify obscure points. They may also be asked to discuss in greater detail issues which have not been adequately canvassed or to concentrate their pleadings on certain decisive issues or to commence their oral submissions by answering certain questions put to them by the Court.

The parties' replies to questions are given orally during the hearing unless otherwise decided.

A situation sometimes arises where the Court considers it useful to request the co-ordination of oral submissions by several Counsels who are putting forward essentially the same views. This may happen when several parties defend the same point of view before the Court (a situation that arises particularly where there are interventions or if cases have been joined). Counsel is then invited to confer with each other before the hearing in order to avoid repetition. However, counsel is also encouraged to take the initiative to co-ordinate oral submissions with a view to limiting the duration of the oral procedure.

b. Report for the Hearing

About three weeks before the hearing, the *Report for the Hearing* is sent to all participants in the proceedings. The Report is drawn up by the Judge-Rapporteur.

Where there is to be no oral procedure (see C.7 below), the Report for the Hearing may be replaced by a *Report of the Judge-Rapporteur*. Apart from the name, there is no difference between a Report for the Hearing and a Report of the Judge-Rapporteur.

After receiving the Report for the Hearing or, in certain cases, the Report of the Judge-Rapporteur, the parties are, if applicable, invited to satisfy themselves that the basic arguments have been correctly summarized and that the report adequately reflects the views of the parties as expressed in the pleadings. If Counsel finds that this is not the case, it may inform the Registrar and propose any corrections or amendments they consider necessary or appropriate. It must, however, be emphasized that the Report for the Hearing is, by its very nature, a report presented by the Judge-Rapporteur to the other Judges and that it is for him to decide whether it needs to be amended.

2. The purpose of the oral procedure

For both direct actions and preliminary references, the purpose of the oral procedure is:

- to answer the written and oral arguments put forward by the other parties;
- to recall, if necessary, by way of a highly condensed summary, the positions taken by the parties, with emphasis on the essential submissions in support of which written argument has been presented;
- to submit any new arguments prompted by recent events occurring after the close of the written procedure which, for that reason, could not be dealt with in the written pleadings;
- to explain and expound on the more complex points and to highlight the most important points;
- to answer questions put forward by the Court.

In preliminary reference proceedings, the oral procedure enables lawyers to reply briefly to the main arguments set out in other written observations.

The oral procedure must, however, be seen as *supplementing the written procedure* and should not involve repetition of what has already been stated in writing.

3. Conduct of the oral procedure

Before the oral hearing commences, the President usually invites Counsel to a brief preparatory meeting in order to settle arrangements for the hearing. On this occasion, the Court may indicate matters it would like to see dealt with in the oral observations or questions it may ask.

As a rule, the hearing starts with the President declaring the sitting of the Court open and introducing the Court. The case is called by the Registrar and the Judge-Rapporteur is invited to introduce the case. Counsel will then be invited to present oral arguments, starting with the Counsel of the applicant, followed by Counsel for the defendant, then agents representing the governments and institutions. Similarly, in the preliminary reference procedure, the plaintiff before the national court will speak first, etc. This is followed by questions put by the Judges to those presenting oral argument. Counsel should be aware however, that Judges may also ask questions in the course of the oral pleadings. The hearing generally concludes with brief closing arguments from those Counsels who wish to make them.

4. Constraints of language, etc.

Only counsel representing the parties before the national court in preliminary reference proceedings are exempted from using English. Thus, all others pleaders appearing before the Court, including the agents of the EEA States, are to use English in

their written and oral submissions. In practice, however, counsels for the parties in preliminary reference proceedings tend to use English in the pleadings. By using English, simultaneous interpretation is avoided. This allows the pleader to address the Court directly and interact spontaneously with the Court by answering questions from the bench.

Counsel should, in their parties' interest, be attentive in order to ensure that what they say is fully understood by the Judges, who are not native speakers. It is preferable to speak in a clear and well-structured manner, using simple terms and short sentences, avoiding any local jargon or unusual expressions.

Counsels are advised against reading out a prepared text. In cases where Counsel prefers to follow a text, special care should be taken in keeping sentences short as well as maintaining normal talking speed.

All pleadings are recorded but the recording serves only for the internal purposes of the Court. Counsels should remember to turn on and speak directly into the microphone.

Counsel may submit to the Court an outline of their talk and/or list of cases they refer to. However, such material may not contain anything that may constitute supplementary written pleadings.

5. Time allowed for addressing the Court

As a general rule, the time allowed to each main party is normally limited to a *maximum of 30 minutes*. The time allowed to other participants is normally limited to a *maximum of 15 minutes*. This limitation applies only to oral argument and does not include the time taken to reply to questions put by the Judges. Counsel will be informed about their time limit before the oral hearing.

Exceptions to the time rule may be allowed by the President should circumstances so warrant. For that purpose, an application must be sent to the Registrar, giving a detailed explanation and indicating the time considered necessary. In order to be taken into consideration, such applications should be sent to the Court immediately after the invitation to the oral hearing has been received.

When a party is represented by more than one Counsel, no more than two of them may present an oral argument and their combined speaking time must not exceed the time limits indicated above. The answers to the questions put by the Judges and replies to the observations of other Counsel may, however, be given by Counsel other than those who addressed the Court.

6. The need for oral submissions

It is for each Counsel to assess, in the light of the purpose of the oral procedure, whether an oral submission is really necessary or whether a simple reference to the written observations or pleadings suffices. If a party refrains from presenting oral argument, this will never be interpreted as constituting acquiescence in the arguments presented by another party.

It also goes without saying that the Court takes account of the procedural constraints inherent to the preliminary reference procedure, in which only the oral procedure gives the parties an opportunity to respond to the written observations of other participants or address new developments.

7. Omission of the hearing

The oral procedure may be dispensed with in certain cases.

In *direct action* cases, Article 41(2) RP requires that the parties consent if the oral procedure is to be dispensed with.

In *advisory opinion* cases, Article 97(4) RP provides that the Court may decide to dispense with the oral procedure following a report from the Judge-Rapporteur, provided that none of the parties and others entitled to submit statements and written observations have asked to make an oral submission.

8. Hearing of applications for interim measures

As a rule, before an order concerning interim measures is made, the views of the parties concerned are heard by the President, with the Judge-Rapporteur in attendance in some cases. Such hearings may be less formal than the main hearing and even held in camera. In practice, the President starts by summarizing, orally, the difficulties involved in the case. The President then invites the parties to express their views on those difficulties. The hearing ends with questions put to the parties.

It must be borne in mind that such hearings are not intended to enable the parties to address the merits of the case. Moreover, the decision of the Court on an interim measure is without prejudice to its decision on the merits of the case (Article 83(4) RP).

9. Practical advice

a. Postponement of hearing

The Court grants requests for postponement only for compelling reasons.

b. Dress

Lawyers are required to appear before the Court in the robes they would use before their highest national courts. Those appearing before the Court as agents are not required to wear robes but may choose to do so, on their own initiative. This rule does not apply to hearings concerning interim measures, at which neither Judges nor Counsel need to wear robes. As the Court does not have spare robes to lend, lawyers must bring their own robes to the hearings.

c. Addressing the Court

The normal manner of addressing the Court is “Mr President and Members of the Court” or “My Lords”. This may occasionally be shortened to “the Court”, as in “the Court will be aware that ...”.

d. The location of the oral hearing

It is not possible to hold all oral hearings at the Court’s premises at 1 rue Fort Thüngen in Luxembourg (colloquially referred to as the "Hemicycle-building"). Hearings may therefore be conducted at other locations in Luxembourg which are rented for these purposes. Hence, Counsel must be attentive to the exact location of the hearing as notified in the invitation to the hearing.

At the Court’s premises in Luxembourg, Counsel may be required to produce identity card or other means of identification at the entry.

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