CCBE COMMENTS ON THE DRAFT RULES OF PROCEDURE

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CCBE comments on the Draft Rules of Procedure

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE has examined the draft Rules of Procedure and welcomes the Court's work to improve and update the Rules of Procedure.

It is wholly appropriate that the Court's draft reorganises the draft Rules so as to give suitable prominence to the rules applicable to preliminary references, which form an ever increasing proportion of the Court's workload, and also to the rules governing direct actions and appeals. The insertion of a clear procedure for applications for legal aid and clarification of its application to preliminary reference cases provides welcome recognition of both the urgent and sensitive nature of such applications. The CCBE therefore views the overall shape and structure of the draft Rules as a significant step forward and supportive of access to justice. Many lawyers plead only once in their careers before the Court and it is therefore important that the rules are clear and easily understood.

In so far as the draft Rules refer to changes envisaged in the draft amendment to the Statute of the Court, the CCBE makes no comment. The CCBE seeks to focus on issues of access to justice and views the internal organisation of the Court (e.g. the creation of a Vice President) as a matter for the Court. The CCBE does however strongly endorse the request by the Court for structural measures to be taken by Member States to deal with the backlog of judicial business at the General Court. The CCBE submits that either more judges need to be appointed to the General Court or a new specialised tribunal needs to be created.

While the CCBE welcomes most of the proposed changes in the draft Rules, a few of the proposals raise very serious concerns for the CCBE.

In order to assist both the Court and those involved in the decision making process, the CCBE has made a number of comments on the draft Rules of Procedure (Annex A) and prepared a number of highlighted changes in an annotated version of the draft Rules (Annex B).

The CCBE hopes its comments will be taken into account by Member States in the Council Working Group and by the Court when preparing the final version of the Rules, and remains ready to assist both the representatives of the Member States and the Court if requested.

ANNEX A

CCBE COMMENTS ON THE DRAFT RULES OF PROCEDURE

(1) GENERAL POINTS

Extension of the power to dispense with an oral hearing

Article 77, in so far as it allows the Court to decide not to hold a hearing if it considers that the parties have been able adequately to present their point of view, constitutes a substantial extension of the power contained in Article 44a to dispense with an oral hearing. The CCBE submits that it ought not to be adopted for the following reasons.

First, the oral hearing is a major feature of access to justice. In references for preliminary ruling it is critical since it is the only opportunity to reply to the observations filed by other parties. In other cases, which raise technical and complex issues, the oral hearing represents the occasion when all involved in the case: the Judges, the lawyers and the parties, focus on the case at the same time affording the only opportunity to clarify disputed or obscure points of law or fact.

The oral hearing is therefore, in the particular context of the practical constraints the Court is confronted with, the most suitable and often the only opportunity to raise and discuss questions that are important to render justice in an appropriate manner.

Second, the Court's response to questions from the House of Lords in 2010 established that in a recent year, the Court decided 600 cases, 180 of which had an oral hearing.[1] This represents less than a third of all cases decided. There thus appears to be no suggestion that there is a need for even greater flexibility not to hold an oral hearing.

Third, the reference in the Court's Notes to the existing power to decide by reasoned order under Article 104(3) does not support such a wide power. Article 104(3), by its express terms, is limited to where the law is already clear.

Fourth, contrary to the Court's Note, it is not understood that Article 44a is currently applied to deny a hearing where one is requested even if the reasons given for seeking such a hearing are perfunctory.

Fifth, the draft Article 77 does not foresee hearing the parties prior to such a decision, even on paper. It is submitted that this is contrary to access to justice (because it prevents the parties from expressing themselves before the Court), fair procedures (since it may deprive parties of the possibility of commenting on pleadings adduced by others, particularly in references) and the good administration of justice (because it will limit the scope of argument before the Court).

Sixth, and finally, if, contrary to these submissions, such a power were included in the terms proposed, it is suggested that the decision to deny a hearing must, at a minimum, be reasoned as to how it is considered that the parties have "been able adequately to present their point of view".

Selective translation of written pleadings

The CCBE notes the proposal at Article 58 of the draft Rules of Procedure to empower the Court, by decision, to determine criteria for the translation of written pleadings to be limited to the translation of their "essential passages". The CCBE considers that any such decision should be adopted by the Member States. In any event it urges that the proposal be reconsidered.

While the Court has, for understandable reasons, chosen to use a single language for internal purposes (historically, French), parties are entitled to address the Court in the language of the case, and are entitled to have their pleadings heard by the Court. This is not merely a statement of the law, but a necessary pre-condition for the maintenance of public confidence in the European Union judicial system.

In the respectful view of the CCBE, any rule that only part of the pleadings of a party should be translated into the internal language of the Court by definition implies that the Court will not hear the

[1] http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/12815.htm

totality of that party's pleadings. This cannot be reconciled with the requirements of due process and access to justice under the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.

Moreover, the proposal appears to envisage that the Court, in a way that is not transparent to the parties, will decide which passages of a party's pleadings are "essential" and thus worthy of translation. Is it proposed that it will really be the Court which decides which parts go to translators or will it be the translators seeking to interpret guidelines from the Court? This lack of transparency in relation to such a fundamental issue again cannot be reconciled with applicable fundamental rights.

In addition, it may be observed that the proposal would directly advantage parties from particular Member States, namely those that are French-speaking, over parties from other Member States. Parties able conveniently to submit their written pleadings in French will have those pleadings heard in full by the Court, while others who rely on their right to submit pleadings in the language of the case may be heard only in relation to that part of the pleadings that the Court chooses to receive. The EU Institutions will be part of the privileged few given the convention that they supply French translations of their pleadings.

With regret, the CCBE can only observe that this would directly discriminate between parties from different Member States in relation to the fundamental right of access to justice. Such discrimination would occur even within the context of a specific case, where one party (e.g. EU Institutions, French-speaking Member States) could have its pleadings heard in full whilst an opposing party was denied that right. There is a real risk that such difference in treatment would have an influence on the outcome of some cases, and could certainly be perceived as having such an influence by impartial observers and the general public.

The CCBE therefore greatly regrets this proposal. The CCBE also questions its legality by reference to the fundamental principles underpinning European Union law.

Abolition of the Report for the Hearing

The CCBE view on this issue is well known. The Report for the Hearing is a useful document in so far as it demonstrates the Court's understanding – or, on occasion misunderstanding - of the parties' arguments. As such, it is a valuable contribution to access to justice, permitting the parties to make submissions in respect of the Report. This has been of particular importance in complex cases before the General Court. Moreover, the report for the hearing has always had the useful function of presenting an objective overview of the case, to the benefit of both judges and parties, prior to and with great benefit for the oral hearing. It focuses the debate on the essential. Also, by containing a full account of the undisputed facts of the case and a summary of the respective arguments of the parties, it is the basis of the judgment to come.

In its current form, which format has regrettably also been adopted by the General Court in the very recent past, it is a less useful document.

However the Report for the Hearing is one of the few measures of procedure which permits a degree of transparency as to the issues raised by a case and the parties' views as to their resolution in advance of the Opinion (where there is an Opinion) and of the Judgment. As will have been apparent from the CCBE Letter to the Court of 8 July 2010, the CCBE and more generally clients of lawyers in Europe attach real importance to transparency in cases pending before the Court. This makes a real contribution to increasing the citizens' sense of the legitimacy of the Court.

Increasing transparency

Furthermore the abolition of the Report for the Hearing would diminish the transparency of the proceedings of the Court. The CCBE takes the view that, by contrast, the reformulation of the Rules of Procedure should take the opportunity to increase transparency at the Court of Justice. The CCBE refers to its request that, as is the case before the European Court of Human Rights, hearings or at least hearings in significant cases are available for viewing on the internet. It is understood that the hearing rooms are equipped to accommodate such a development and that on occasion the press watches proceedings at the Court in a separate room by video-link. Further or alternatively, given the

public nature of the oral proceedings at the Court, at least audio recordings (including the French translation) of the oral hearing of cases should be available on the internet/website of the Court – and not simply for the parties to the case as proposed by draft Rule 86. As the CCBE mentioned before, the availability of an audio file would be extremely useful to follow cases (preliminary references or otherwise) which raise issues which are also the subject of other cases pending before the European or national courts. It will avoid counsel or clients having to travel to Luxembourg to follow the oral debate in similar cases, an issue of particular importance to those with lesser financial resources.

Participation by stakeholders in a Rules Committee

In certain articles (e.g. Article 48(4), Article 58), the Court seeks to insert a power enabling it to adopt certain classes of rule by decision.

Such a power permits changes to be made without any consultation. The recent decision to limit severely the content of the Report for the Hearing in the General Court is an example of important changes in procedure without consultation. Once such a measure has been taken, it is unlikely to be revoked. Whilst the Court doubtless seeks to anticipate the possible reactions of stakeholders (lawyers, clients, national judges etc), that approach lacks efficacy because it tries to second-guess the possible reactions of stakeholders, rather than simply asking them what they think. As a consequence these powers are exercised in the absence of any consultation of interested parties.

It would be both feasible and more efficient, without changing the legislative procedure for modifications to the procedural rules or the power for the Court to adopt decisions, to provide for the formation of a Rules Committee to meet once per annum. Membership could include Members of the Court, legal services of EU institutions, Member States, Judges from Member States, the CCBE and consumer organisations. Such a Committee would constitute a sounding board for possible modifications/improvements to procedural rules at an early stage. Moreover it would recognise that the administration of justice within the EU is a cooperative endeavour involving all those concerned.

Publication of material from the Court in the Official Journal

In so far as certain data (e.g. the dates of judicial vacations and list of official holidays – Article 24(6)) is no longer to be stated in the rules of procedure, it would seem essential to ensure that such information appears on the procedural pages of the Court's website, it being noted that there is already a heading for such material on the procedural page. This is particularly important for a Court before which most lawyers plead at most intermittently through the course of their careers.

So far as other material published by the Court in the Official Journal (e.g. Article 27(3), 28(4) etc) is concerned, it appears desirable that such materials are readily available for consultation from links in the Curia website.

Possible introduction of provision for Amicus Curiae submissions

In the context of this general review of the Rules of Procedure, the CCBE would invite reconsideration of the possibility of providing for amicus curiae submissions. The Court is increasingly regarded as a constitutional court for Europe and in that context it seems important that it has the power to accept such submissions so as to be fully appraised of the relevant arguments.

In the CCBE's view, it is in the interests of the good administration of justice to facilitate the reception of such submissions. It is suggested that, whilst maintaining full control by the Court, and without adding additional "parties" to the proceedings, it should be possible to amend the provisions on measures of organisation of procedure to widen the sources of inspiration for the Court when deciding important questions of law.

An additional provision in Article 61 would enable the Court to accept amicus curiae statements into the Court's file. It is envisaged that the following approach would avoid any additional burden on the proceedings:

- the Court would retain full discretion as to whether or not to accept such a submission, a discretion which would only be likely to exercised where the Court felt that a wider context to the arguments would be of assistance
- the amicus curiae statement is accepted into the Court's case file without the amicus curiae becoming a 'party' to the procedure;
- there is no legal obligation to respond to the amicus curiae statement in the Opinion of the Advocate General or in the Judgment of the Court;
- the amicus curiae has no automatic right to participate in the hearing;
- parties may choose whether or not to comment on the amicus curiae statement in their written pleadings and at the hearing.

The CCBE would also recommend that the Court should have the power – but no obligation – to invite the amicus curiae to make an oral statement at the hearing.

Court's Notes on the Draft Procedural Rules

These notes are very useful and make the Rules an extremely user-friendly document – an important issue given that many lawyers only attend the Court on very few occasions throughout their careers. As a minimum, it is requested that the draft procedural rules including Notes be available on the procedural pages of the Court's website. Ideally the Notes could be updated to refer to the final text and thereby serve as guidance on the operation of the Rules of Procedure.

Abolition of the délai de distance

Whilst one can see the force of the point that electronic communications have made this somewhat of an anachronism, it nevertheless serves to alleviate some of the strictness of the very short deadlines provided by law, imposing further restrictions on access to justice. The current timetable is already tight, even when the 10 day delai de distance is added to the two month deadline. Regular litigants at the Court assisted by large law firms may not have difficulty in meeting any revised deadlines but it is also important, so far as may be practicable, to facilitate litigants, possibly advised by small independent lawyers without large resources, to bring cases before the Court. The rules contained in the Rules of Procedure and the practice directions on the format in which an appeal must be presented, selection and obtaining of the documents that need to be submitted with an appeal, and the requirements concerning the length of the pleadings are all elements that require time to comply with. In the view of the CCBE any further reduction in the time available would be regrettable. Moreover it is difficult to see what serious inconvenience the Court would sustain were the status quo to be maintained.

(2) REFERENCES FOR A PRELIMINARY RULING

The CCBE welcomes the increased prominence given to the rules governing the preliminary ruling procedure and the changes and additions suggested in this section.

As regards the proposed amendment to what is currently Article 104(3), the difficulty with the amendment is that, as currently drafted, this would permit immediate disposal of a case by reasoned order where the Court is of the opinion that there is no reasonable doubt. Such a procedure has the potential to appear contrary to the collegiality of the courts of the Union. It is suggested that a reasonable way to allay such fears would be at least to permit the parties to file written observations prior to disposal by reasoned order. Rights of defence are then assured but in suitably justified cases the reference could then be disposed of by reasoned order.

(3) DIRECT ACTIONS

Identification of confidential material - Article 120(2) and 124(2)

This creates a supplemental and arguably an unnecessary burden on the parties, if they have to identify possible confidential information at a time when it is uncertain whether someone will intervene and who that might be. Also, certain information can be confidential vis-à-vis one intervener but not vis-à-vis others, e.g. a party may be quite happy for an EU Institution to receive confidential information but not for a competitor in the same industry.

If such an obligation were to be imposed, the obligation should arise only a reasonable time after filing the relevant pleading as is currently the case for example for the French translations of the pleadings of EU Institutions. This would help to ease the burden but it would not deal with the problem of wasted costs for cases where no intervention is reasonably anticipated.

Power to limit arguments addressed in Reply - Article 126 (2)

The provision gives the President the power to limit the points that can be addressed in the reply and the rejoinder. While guidance from the Court as to topics that might usefully be addressed in the reply or the rejoinder is extremely welcome, the denial of the right of parties before the Court independently to determine the content of their pleadings is, the CCBE respectfully submits, an unjustifiable denial of justice in that it would directly interfere with the right of litigants to place arguments of their own choosing before the Court.

(4) APPEALS

Restriction of the right of parties independently to determine the content of their reply or rejoinder

The CCBE notes the proposed change at **Articles 177(2)** and **182(2)** of the draft Rules of Procedure to introduce a power for the President to "limit the number of pages and the subject-matter" of the reply and the rejoinder in appeals and cross-appeals. The CCBE urges that this proposal be reconsidered.

While guidance from the Court as to topics that might usefully be addressed in the reply or the rejoinder is extremely welcome, the denial of the right of parties before the Court independently to determine the content of their pleadings is, the CCBE respectfully submits, an unjustifiable denial of justice.

It should be emphasised that, in contrast to the Court's note ("he may request that party to limit …") the proposed wording would create an absolute power for the President to "limit" the subject-matter that may be addressed by the parties. This goes considerably beyond offering guidance (to which the CCBE has no objection) and directly interferes with the right of litigants to place arguments of their own choosing before the Court.

The same objection applies to the proposal for the President to "limit" the number of pages that parties may submit. While this may not directly interfere with the ability of parties to choose their arguments, it may have this effect in certain circumstances. If the Court wishes to discourage parties from submitting written pleadings of unnecessary length, it is suggested that it would be better to provide for the President to request that parties remain within an indicative number of pages and to provide reasons should they exceed that number.

Cross appeal in separate document (Article 178(2))

Because this appears to require a separate self-standing document, this creates a significant burden for the party lodging the cross appeal and arguably unnecessarily blows up the file, as many documents which are already on file as part of the appeal must be submitted again. It is not clear what benefit can be derived from this proposed provision for the Court.

Quashing of General Court judgments without due process

The CCBE notes the proposed new power at **Article 184** for the Court of Justice to declare an appeal or cross-appeal manifestly well founded, without hearing the parties. The CCBE urges that this proposal be reconsidered.

In the CCBE's respectful view, such a power is inconsistent with the dignity of the European Union judicial system, and constitutes a denial of justice to the party that was successful before the General Court.

While the CCBE is of course sympathetic to the concern not unnecessarily to waste Court time, and notes that this power would apply only where "the Court has already ruled on one or more questions of law identical to those raised by the pleas in law of the appeal or cross-appeal", the fact remains that the proposal would involve the Court of Justice deciding that a judgment of the General Court, resulting from a full judicial procedure and deliberation on the facts and law concerned is in effect "manifestly unfounded". Ruling that a General Court finding, that a particular proposition constitutes the law of the European Union, is manifestly unfounded would surely undermine the respect that Union citizens have for the General Court and thus for the European Union judicial system as a whole.

It should also be recalled that the rights of the successful party before the General Court have by definition been vindicated by a formal judicial procedure culminating in the judgment of the General Court. The CCBE considers it contrary to due process for the party to lose the benefit of this judicial determination without the ability to defend its rights before Court of Justice. This is precisely what the new Article 184 envisages. Moreover it may be observed that the fact that the Court of Justice has in one case adopted a particular interpretation of the law does not bind it to do the same in subsequent cases, and the Court has exercised this freedom on various occasions. Thus it is submitted that a successful party before the General Court cannot be deprived of the opportunity to argue that the Court of Justice should uphold the General Court judgment without this constituting a denial of justice.

ANNEX B

ANNOTATED COMMENTS AND SUGGESTIONS

Draft Rules of Procedure of the Court of Justice

RULES OF PROCEDURE OF THE COURT OF JUSTICE

Article 58 Documents of excessive length

Without prejudice to any special provisions laid down in these Rules, the Court may, by decision, determine the criteria for the translation of written pleadings or observations lodged in a case to be limited, on account of their excessive length, to the translation of the essential passages of those written pleadings or observations. That decision shall be published in the *Official Journal of the European Union*.

CCBE Comment:

A number of points arise from this proposal.

First, in principle this power strikes at the concept of access to justice. Accordingly it is submitted that the onus is on the Court to justify, by evidence, why it requires the exercise of this or any similar power at this or some future time.

Second, the Court does not appear to contend that excessively lengthy pleadings give rise to difficulties at present. One therefore wonders why it seeks to acquire the powers described in Article 58 now.

Third, a power to decline to translate parts of a pleading gives the Court (as distinct from the parties) the power to control the length and the content of the material before it. Since this allows the Court to have the last say as to what is put before it, it appears to be at odds with the concept of access to justice.

Fourth, can one presume that the Court will decide what is to be translated without consulting the party in question? If so, that will create a real risk that arguments could be overlooked or ignored. If not, what precisely will the Court gain from introducing the procedure now proposed?

Fifth, if (contrary to what may be implied) the Court intends to consult with the parties as to what is to be translated, surely it would be better off consulting with the parties as to the content of the original document. In other words, if the Court needs to go down this path, it would be better seeking to limit the length of original documents, after consultation with the authors of those documents, rather than proceeding in the manner suggested.

Article 61 Measures of organisation prescribed by the Court

1. In addition to the measures which may be prescribed in accordance with Article 24 of the Statute, the Court may invite the parties or the interested persons referred to in Article 23 of the Statute to answer certain questions in writing, within the time-limit laid down by the Court, or at the hearing.
2. The Court may also invite the participants in the hearing to concentrate in their oral pleadings on one or more specified issues.

3. The Court may accept into the file a written amicus curiae statement addressing questions of law, offered by a person in the interests of the good administration of justice. The Court may subsequently decide to invite that person to address the Court on its statement at the hearing, in which case the person shall be represented in accordance with Article 19 of the Statute without acquiring the status of a party to the proceedings. **(CCBE SUGGESTION)**

Article 64 Determination of measures of inquiry

1. The formation of the Court, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved.
2. The order shall be served on the parties or the interested persons referred to in Article 23 of the Statute.
3. Without prejudice to Articles 24 and 25 of the Statute, the following measures of inquiry may be adopted:
   (a) the personal appearance of the parties;
   (b) a request for information and production of documents;
   (c) oral testimony whether to be heard directly, by witness statements or by video-link; **(CCBE SUGGESTION)**
   (d) the commissioning of an expert's report;
   (e) an inspection of the place or thing in question.

CCBE Comment:

It seems desirable to seek to include provision for measures which may serve to reduce costs.

Article 86 Recording of the hearing

The President may, ~~on a duly substantiate request~~, authorise a party or an interested person referred to in Article 23 of the Statute who has participated in the proceedings and/or, on a duly substantiated request, any other person **(CCBE SUGGESTION)** to listen to the soundtrack of the hearing in the language used by the speaker during that hearing.

CCBE Comment:

This is a welcome development. However the CCBE does not see any reason of principle for limiting this to a party who has participated in proceedings. A non-party may have an equal interest in seeing the argument, for example if the same issue has arisen in separate proceedings. In an EU of 27 or more Member States, the possibility of attending the oral hearing may be more hypothetical than real and EU citizens should not be prejudiced by this fact.

Article 97 Participation in preliminary ruling proceedings

1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:
   (a) the parties to the main proceedings,

(b) the Member States,

(c) the European Commission,

(d) the institution which adopted the act the validity or interpretation of which is in dispute,

(e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,

(f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure if that takes place.

CCBE Comment:

Article 97(2) is a welcome clarification.

Article 98 Parties to the main proceedings

1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.
2. Where the referring court or tribunal informs the Court that a party has been admitted to the main proceedings at a time when the proceedings are already pending before the Court **(CCBE SUGGESTION)**, that party becomes a party to the proceedings pending before the Court but **(CCBE SUGGESTION)** must accept the case as he finds it at the time when the Court is informed by the referring court or tribunal that the party has been admitted. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.
3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

CCBE Comment:

In the second line of Article 98(2), wording improved. Words in third line of Article 98(2) added for clarification.

Article 100 Reply by reasoned order

Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time after expiry of the two month deadline in Article 23 of the Statute **(CCBE SUGGESTION)**, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

CCBE Comment:

For reasoning of the addition, see general comment on preliminary references in Annex A above.

Article 104 Rectification of judgments and orders

The Court shall, of its own motion, rectify clerical mistakes, errors in calculation and obvious inaccuracies affecting judgments or orders.

Court's Note: Article 104 reproduces, in essence, the terms of Article 66(1) of the existing Rules of Procedure. Unlike that provision, however, Article 104 of the draft does not provide for the parties to be able to submit written observations on errors or inaccuracies found in a judgment or order of the Court. Since there are no parties, as such, in preliminary ruling proceedings, such proceedings being non-contentious and establishing direct cooperation between the Court and a national court or tribunal, the draft stipulates that the Court may, of its own motion, rectify clerical mistakes, errors in calculation or obvious inaccuracies affecting its decisions.

CCBE Comment:

The existing provision in Article 66 has the merit of establishing a clear procedure to be followed in the event of the relevant forms of inaccuracy being identified in judgments. Given that what is in issue is a rectification of a judgment already given, it is entirely consistent with rights of defence that all parties should be notified and given an opportunity to submit comments. The Court's Note refers to preliminary references though, first this procedure is a general procedure for all judgments, and secondly "party" would be interpreted by reference to Article 23 of the Statute. The CCBE submits that this change is not beneficial.

Article 105 Interpretation of preliminary rulings

1. Article 160 relating to the interpretation of judgments and orders shall not apply to decisions given in reply to a request for a preliminary ruling.
2. It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.

CCBE Comment:

Article 105(2) is a welcome clarification.

EXPEDITED PRELIMINARY RULING PROCEDURE

Article 106 Expedited procedure

1. At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules.

2. In that event, the President shall immediately fix the date for the hearing, which shall be communicated to the parties to the main proceedings and to the other interested persons referred to in Article 23 of the Statute when the request for a preliminary ruling is served.
3. The parties and other interested persons referred to in the preceding paragraph may lodge statements of case or written observations within a time-limit prescribed by the President, which shall not be less than 15 days. The President may request those parties and other interested persons to restrict the matters addressed in their statement of case or written observations to the essential points of law raised by the request for a preliminary ruling.
4. The statements of case or written observations, if any, shall be communicated to the parties and other interested persons referred to above prior to the hearing.
5. The Court shall rule after hearing the Advocate General.

Court's Note: The present article reproduces, for the most part, the content of Article 104a of the existing Rules of Procedure. Paragraph 1 of the present article, however, additionally gives the President of the Court the option of deciding, of his own motion, to apply an expedited procedure to a reference for a preliminary ruling. The possibility of acting of his own motion, currently already provided for in relation to the launch of urgent procedures in the area of freedom, security and justice, has proved particularly useful in cases displaying all the characteristics needed in order for them to be dealt with quickly, but in which the referring court or tribunal has inadvertently failed to include a specific request for the urgent procedure to be applied.

The Court therefore proposes that the option of the expedited procedure provided for in the present article being applied by the President, of his own motion, should be extended to all references, if justified by the particular circumstances of the case. The draft slightly amends the terms of Article 104a of the existing Rules of Procedure in that regard. Although Article 104a refers to the exceptional urgency of a ruling on the question put to the Court, reference is made from now on to the need to rule within a short time where the nature of the case requires it.

CCBE Comment:

The extension of this power to the need to rule within a short time where the nature of the case requires is welcomed.

Article 117 Decision on the application for legal aid

1. As soon as the application for legal aid has been lodged it shall be assigned by the President to the Judge-Rapporteur responsible for the case in the context of which the application has been made.
2. The decision to grant legal aid, in full or in part, or to refuse it shall be taken, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by the Chamber of three Judges to which the Judge-Rapporteur is assigned. The formation of the Court shall, in that event, be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.
3. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.
4. The formation of the Court shall give its decision by way of order. Where the application for legal aid is refused in whole or in part, the order shall state the reasons for that refusal.

CCBE Comment:

Article 117(4) provides a welcome clarification that reasons are to be provided for refusal of an application for legal aid.

Article 145 Costs of proceedings

Proceedings before the Court shall be free of charge, except that:

(a) where a party has caused the Court to incur avoidable costs the Court may, after hearing the Advocate General, order that party to refund them;

(b) where copying or translation work is carried out at the request of a party, the cost shall, in so far as the Registrar considers it excessive, be paid for by that party on the Registry's scale of charges referred to in Article 22.

CCBE Comment:

Perhaps greater use could be made of this provision to the extent that there is real concern about the length of particular pleadings.

Article 177 Reply and rejoinder

1. The appeal and the response may be supplemented by a reply and a rejoinder only where the President, on a duly reasoned application submitted by the appellant within seven days of service of the response, considers it necessary, after hearing the Judge-Rapporteur and the Advocate General, in particular to enable the appellant to present his views on a plea of inadmissibility or on new matters relied on in the response.
2. The President shall fix the date by which the reply is to be produced and, upon service of that pleading, the date by which the rejoinder is to be produced. He may request the parties to remain within an indicative number of pages and to provide reasons should they seek to exceed that number **(CCBE SUGGESTION).**

CCBE Comment:

Suggested revised wording in accordance with comments in Annex A above.

Article 182 Reply and rejoinder on a cross-appeal

1. The cross-appeal and the response thereto may be supplemented by a reply and a rejoinder only where the President, on a duly reasoned application submitted by the party who brought the cross-appeal within seven days of service of the response to the cross-appeal, considers it necessary, after hearing the Judge-Rapporteur and the Advocate General, in particular to enable that party to present his views on a plea of inadmissibility or on new matters relied on in the response to the cross-appeal.

2. The President shall fix the date by which that reply is to be produced and, upon service of that pleading, the date by which the rejoinder is to be produced. He may request parties to remain within an indicative number of pages and to provide reasons should they choose to exceed that number **(CCBE SUGGESTION).**

CCBE Comment:

Suggested revised wording.

Article 184 Appeal or cross-appeal well founded in light of previous case-law

Where the Court has already ruled on one or more questions of law identical to those raised by the pleas in law of the appeal or cross-appeal and accordingly envisages that **(CCBE SUGGESTION)** the appeal or cross-appeal may be **(CCBE SUGGESTION).**well founded, it may, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, ask the parties to submit observations on the implications of the case-law for the appeal or cross-appeal. In light of those observations, the Court **(CCBE SUGGESTION)** may decide by order in which reference is made to the relevant case-law to declare the appeal or cross-appeal well founded.

CCBE Comment:

Suggested revised wording for reasons given in Annex A above.

Article 199 Assignment to a Judge-Rapporteur and Advocate General

As soon as the request for an Opinion has been submitted, the President shall designate a Judge-Rapporteur and the First Advocate General shall assign the case to an Advocate General.

Court's Note: The present article corresponds to Article 108(1) of the Rules of Procedure, which it nevertheless supplements by providing for the case to be assigned to an Advocate General, since it is proposed to remove the obligation that all the Advocates General should be heard before the Court rules.

CCBE Comment:

Since it appears desirable that all members of the Court participate in the Opinion process, does the current procedure give rise to such difficulties as to justify removing the obligation to hear all Advocate Generals before delivering an Opinion ?