

CCBE comments on the draft Rules of Procedure of the Court of Justice and the General Court Version of 27/02/2024

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers.

Following the amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union, which was adopted in March 2024¹ (awaiting publication in the Official Journal), the Court of Justice (CJEU)² and the General Court (GCEU)³ have now presented draft amendments to their rules of procedures (draft RoP) with a view to adoption by the Council.

Essentially, the draft RoP aim to implement, for both courts, the revised Statute of the Court of Justice, in particular the transfer of jurisdiction to give preliminary rulings from the Court of Justice to the General Court in six specific areas⁴. The draft RoP include other changes to modernise the rules of procedure and set a framework for the broadcasting of hearings in both jurisdictions.

While the draft RoP are currently discussed by the Council of the European Union - Working Party on the Court of Justice (Council WP), the CCBE would like to provide the following observations.

The CCBE hopes its comments will be of assistance towards the development of the Rules and we are happy to respond to any questions, should the need arise.

The CCBE comments below are based on the two draft versions of 27/02/2024 as published on the Council website.

1. Publication of Written Observations after the closing of the preliminary procedure

- *Statement by Austria, Cyprus, France, Greece, Italy and Malta⁵ (I/A item note, Brussels, 8 March 2024 7296/24 ADD 1)*
- *Draft Amendments to the Rules of Procedure of the Court of Justice : amended Article 96, paragraph 3*
- *Draft Amendments to the Rules of Procedure of the General Court : new Article 202 “Participation in preliminary ruling proceedings”, paragraph 3*

¹<https://www.consilium.europa.eu/en/press/press-releases/2024/03/19/reform-of-the-statute-of-the-court-of-justice-adopted/>

²<https://data.consilium.europa.eu/doc/document/ST-7225-2024-INIT/en/pdf>

³<https://data.consilium.europa.eu/doc/document/ST-7226-2024-INIT/en/pdf>

⁴ As provided for in Article 50b of the revised Statute of the Court of Justice, the limited areas are : the common system of value added tax, excise duties, the Customs Code, the tariff classification of goods under the Combined Nomenclature, compensation and assistance for passengers whose transport services are delayed or cancelled or who are denied boarding, the system for greenhouse gas emission allowance trading.

⁵<https://data.consilium.europa.eu/doc/document/ST-7296-2024-ADD-1/en/pdf>

In the revised Statute of the Court of Justice, the new Article 23(b), supported by Recital (4), introduces a provision for publishing the statements of case or written observations in preliminary ruling procedures:

Article 23(b) : “Statements of case or written observations submitted by an interested person pursuant to this Article shall be published on the website of the Court of Justice of the European Union within a reasonable time after the closing of the case, unless that person raises objections to the publication of that person’s own written submissions.”

*Recital (4) : “**In this context, and as the Court of Justice is increasingly required, in preliminary ruling cases, to rule on matters of a constitutional nature or related to human rights and the Charter of Fundamental Rights of the European Union (“the Charter”), the transparency and openness of the judicial process should be strengthened. To that end, and without prejudice to Regulation (EC) No 1049/2001 of the European Parliament and of the Council⁴, the Statute should be amended in order to provide that the statements of case or written observations submitted by an interested person referred to in Article 23 of the Statute should be published on the website of the Court of Justice of the European Union within a reasonable time after the closing of the case, unless that person raises objections to the publication of that person’s own written submissions, in which case it will be mentioned on the same website that such an objection has been raised. **Such a publication will increase accountability and build trust in the Union as well as in Union law.**”***

The CCBE has taken note of the above-mentioned statement of 8 March 2024 issued by 6 Member States, advocating more possibilities to prevent the publication of written observations made in a CJEU or GCEU preliminary ruling procedure, and wishes to express its disagreement with its content.

Firstly, the (revised) Statute of the Court of Justice sets out in very clear terms why transparency and accountability are essential. The amendment now proposed to the RoP to allow for unmotivated objections to publication of the written observations lodged in the context of preliminary ruling procedures should be regarded as incompatible with the clear need and goal expressed in the Statute to strengthen the transparency and openness of the judicial process.

Secondly, the CCBE considers it incorrect to suggest that submissions made in a preliminary ruling proceeding that is only about the interpretation of EU law, as is clearly the well-defined scope and content of the preliminary ruling procedure, would need to be confidential. Other than suggested in the said statement, business secrets have no place in such observations.

Thirdly, it is important that observations lodged by EU institutions (or agencies) and Member States in preliminary ruling proceedings are made public pro-actively, as these observations reflect the legal views of public authorities on matters that are often important and relevant more generally and in more than one EU Member State. There is no reason or justification for observations by EU institutions and Member States on the interpretation of EU law to be kept confidential. On the contrary, it would greatly assist the interpretation of EU law and the debate on EU law if legal views expressed by EU institutions and Member States would be publicly available. In any event, those views are generally also debated in the public hearing in a preliminary ruling case and – often in summary form – reflected in the judgment of the CJEU. The fact that national proceedings subsequently follow their course taking into account the ruling from the CJEU (or GCEU, in the near future), cannot be a reason to subject the preliminary ruling proceeding to a regime of confidentiality, as the preliminary ruling procedure before the CJEU (or GCEU) is a separate and distinct procedure.

Fourth, the CCBE also notes that the confidentiality suggested in the above-mentioned statement would undermine the efforts to bring EU Court proceedings closer to citizens, notably by opening the possibility that hearings are broadcasted, or video streamed, as more and more supreme courts do so nowadays to allow the wider public to follow hearings.

With the proposed wording in the draft rules of procedure of the Court of Justice and of the General Court, the CCBE notes that there will be no publication if, as foreseen in Article 96, new paragraph (3), “any of those interested persons raises objections to the publication of that person’s statement of case or observations” where “[s]uch objections, **which need not to state the reasons on which they are based and which cannot be challenged [...]**”. This is further explained in the explanatory comment (in page 17).

This mechanism constitutes, in the view of the CCBE, a serious impediment to the goal of information to the public if publication can be opposed by any party on the basis of a simple, unmotivated objection. At the minimum, a distinction should be made between private parties vs. Member States or institutions: the latter should not have the possibility to object or only when duly motivated. Although the Statute does not as such distinguish between parties, it is evident that, from a democratic and rule of law perspective, in particular the often fundamental positions taken by EU institutions and Member states in preliminary procedures on the interpretation of EU law, which as noted in the revised Statute often concern questions of a constitutional nature and/or fundamental rights, should be accessible and made public.

Finally, it can be noted that objections to the broadcasting of hearings (Article 80a (2) of the draft RoP Court of Justice) are possible only to the extent “[a] party or an interested person referred to in Article 23 of the Statute who considers that the hearing which he has been given notice to attend should not be broadcast shall inform the Court of this as soon as possible, setting out in detail the circumstances that justify a decision not to broadcast the hearing.” Hence, here the system is indeed that a motivation is required to oppose broadcasting (i.e. informing the public).

One would expect that *a fortiori* a motivation should be required not to publish observations made by EU institutions or Member states on matters so fundamental as their position regarding the interpretation of EU law.

2. Referrals to the Court of Justice

- ***Comments on the new Article 207 (3) and (4) draft Rules of Procedure of the General Court:***

A new Article 207 governs, in the chronological order in which they might occur, the three situations in which the General Court may be required to refer a request for a preliminary ruling to the Court of Justice.

Article 207 contains a third paragraph (3), which relates to the situation where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law in accordance with the second subparagraph of Article 256(3) TFEU.

The CCBE considers that the parties referred to in Article 23 of the Statute of the Court of Justice should be heard by the Chamber seized of the case, before it proposes to the plenum that the case be referred to the Court of Justice.

At this stage of the proceedings, the parties may have submitted written observations or even may have already intervened in the oral hearing.

Their views on why and how the case requires a decision of principle likely to affect the unity or consistency of Union law can provide the Chamber with a helpful input before it adopts its decision to refer the case to the Court of Justice.

3. Conclusion

The CCBE is happy to have the opportunity to provide comments on the above issues and the CCBE remains available to elaborate on any aspect of the above.